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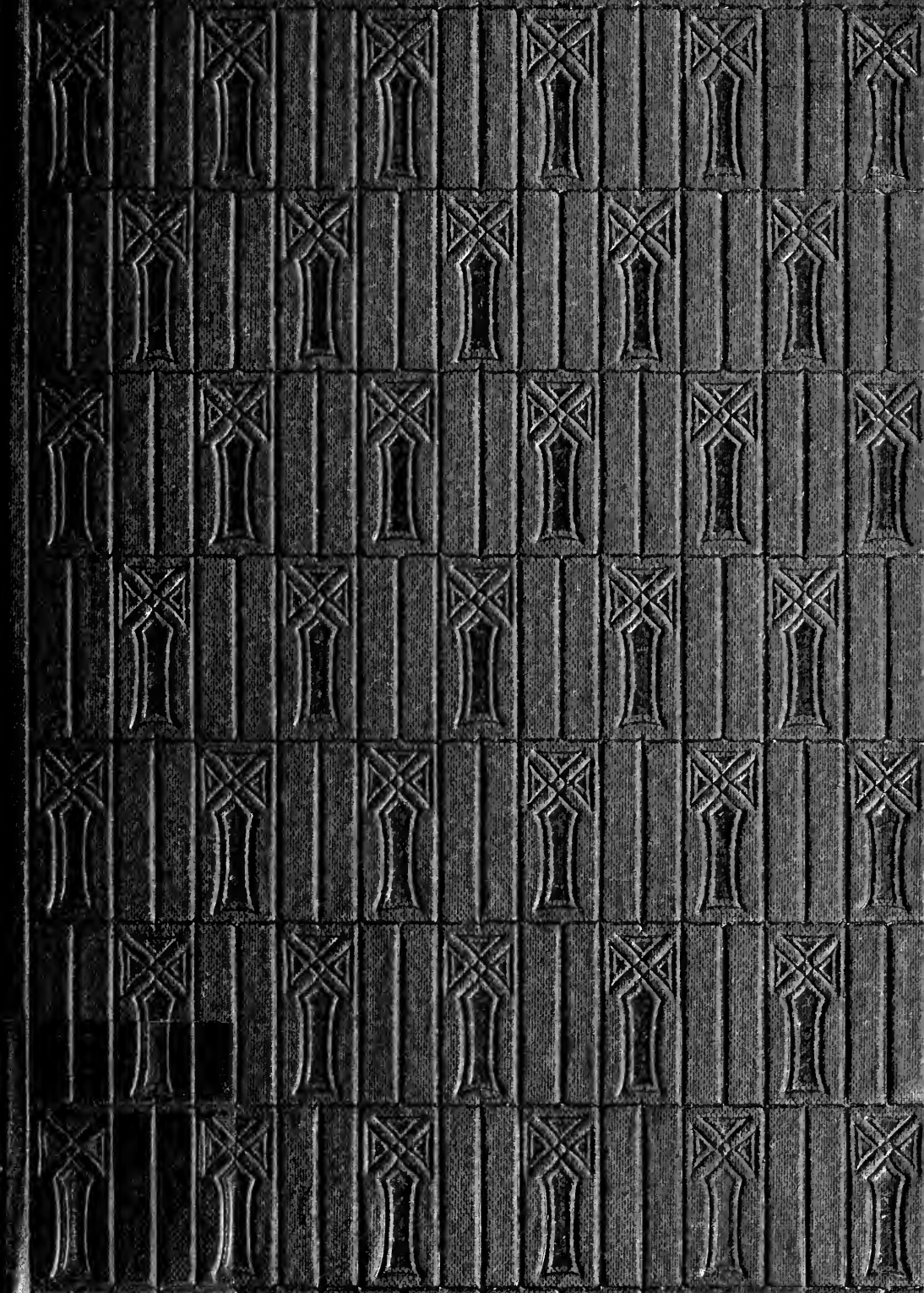

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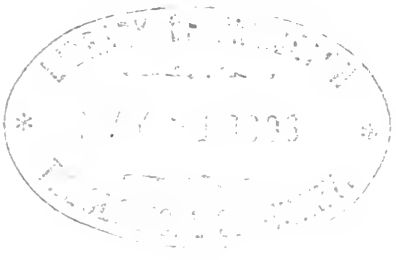

Handbooks for the Clergy

EDITED BY

ARTHUR W. ROBINSON, B.D.

VICAR OF ALLHALLOWS BARKING
BY THE TOWER

THE LEGAL POSITION OF THE CLERGY

THE LEGAL POSITION OF THE CLERGY

BY

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PREFACE

In the following pages an endeavour has been made to give a succinct sketch of the legal position of the parish clergy of the Church of England in respect both of spiritualities and of temporalities. The book, being intended for their use, does not touch upon the subject of ordination by which they acquired the status of deacons or priests. Nor does it deal with the episcopate or the non-parochial clergy, except so far as these subjects are connected with the parochial system.

Like all other human arrangements, our English Church law is, of course, far from being ideally perfect. It may be safely affirmed that there has never been either a Church or a State in which the law has actually been what it ideally ought to have been. It is important to recognise the difference between the two positions; for there has sometimes been a disposition on the part of individuals to confuse them, and to treat what they consider to be the ideal law, as if it were the actual law, and as if, as such, it demanded their loyal obedience. Such an attitude, whether in ecclesiastical

or civil matters, is anarchical in its tendency; for it sets up private judgment instead of the constituted authority as the criterion of what ought or ought not to be done. It can only be justified where the actual law is absolutely inconsistent with the fundamental principles of morality or of Christian truth. The object of the present treatise is to state succinctly what the law is,—not what it ought to be; and no opinion is expressed or suggestion offered as to points in which amendment would be proper or expedient.

Within the limited compass of the book it is obviously impossible to enter into details; and the reader who desires information as to these will find them in the authorities to which reference is made. It must also be borne in mind that the general law on the subject of buildings, property, and pecuniary rights is, in various places, modified by special local enactments or customs. These can only be ascertained on the spot, or by consulting the Acts of Parliament in which they are embodied or recorded.

One other word of caution is desirable. In explaining the legal position of the parochial clergy, it is, of course, necessary to indicate the exact limits of their rights. If they venture beyond these limits, they are manifestly in the wrong. But no community, either ecclesiastical or civil, could maintain its well-being, or even its coherence, if every individual were on all

occasions to take advantage of the full tether of his legal rights. It will frequently be wise and proper for the clergy, in their relations with their ecclesiastical superiors or with the lay officials and other laity of the parish, not to adopt the most uncompromising attitude which the letter of the law permits to them. The dictates of love and of Christian forbearance, and of consideration for the claims of others, as well as of expediency, will not warrant the infringement by an individual of the ordinances of either the Church or the State. But they will more than justify him in refraining from taking up a position of defiance which these ordinances may strictly entitle him to assume.

P. V. SMITH.

Easter, 1905.

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LIST OF ABBREVIATIONS

A. C.	Law Reports (House of Lords and Privy Council) 1891 onwards.
A. & E. . . .	Adolphus & Ellis's Reports (King's Bench) 1834–41.
Add.	Addam's Reports (Ecclesiastical) 1822–6.
Ambl.	Ambler's Reports (Chancery) 1737–83.
App. Ca. . . .	Law Reports (House of Lords and Privy Council) 1875–90.
Atk.	Atkyn's Reports (Chancery) 1735–54.
Ayl. Par. . . .	Ayliffe's *Parergon Juris Canonici Anglicani*, 1726.
B. & C. . . .	Barnewall & Cresswell's Reports (King's Bench) 1822–30.
B. & Ad. . . .	Barnewall & Adolphus' Reports (King's Bench) 1830–34.
B. & Ald. . .	Barnewall & Alderson's Reports (King's Bench) 1818–22.
B. & Sm. . .	Best & Smith's Reports (Queen's Bench) 1861–70.
Beav.	Beavan's Reports (Chancery) 1838–66.
Bl. Comm. . .	Blackstone's Commentaries on the Laws of England.
Burn.	Burn's Ecclesiastical Law, 4 vols.
Canon. . . .	One of the Constitutions and Canons Ecclesiastical agreed upon in the Canterbury Convocation begun in 1603.
C. B.	Common Bench Reports, 1845–56.
C. B. N. S. . .	Common Bench Reports, New Series, 1856–65.
C. & K. . . .	Carrington & Kirwan's Reports (Nisi Prius) 1843–1853.
C. P. D. . . .	Law Reports (Common Pleas Division) 1875–80.
Ch.	Law Reports, Chancery Division, 1891 onwards.

Ch. D. . . .	Law Reports, Chancery Division, 1875–90.
Cl. & F. . . .	Clark & Finnelly's Reports (House of Lords) 1831–46.
Clarke, Proxis .	Francis Clarke's *Proxis in Curiis Ecclesiasticis*, 1666, 1684.
Co. Inst. . . .	Coke's Institutes of the Laws of England, Second Part.
Co. Litt. . . .	Coke upon Littleton (with notes by Hargrave and Butler).
Co. Rep. . . .	Coke's Reports, 1598–1616.
Com. Dig. . .	Comyn's Digest.
Cowp.	Cowper's Reports (King's Bench) 1774–78.
Cripps. . . .	Cripps's Law relating to the Church and Clergy, 6th ed., 1886.
Cro. Jac. . . .	Croke's Reports (temp. James I.) 1603–1625.
Curt.	Curteis's Ecclesiastical Reports, 1834–44.
Degge. . . .	Sir Simon Degge's Parson's Counsellor.
Dr. & Sm. . .	Drewry & Smale's Reports (Chancery) 1859–65.
E. & B. . . .	Ellis & Blackburn's Reports (Queen's Bench) 1854–8.
Eccl. & Adm. .	Ecclesiastical & Admiralty Reports (Spinks) 1853–5.
El. & El. . . .	Ellis & Ellis' Reports (Queen's Bench) 1858–61.
Ex.	Exchequer Reports, 1847–56.
Ex. D. . . .	Law Reports (Exchequer Division) 1875–1880.
Geary	Geary's Law of Marriage and Family Relations (A. & C. Black, 1892).
Gibs. Cod. . .	Gibson's *Codex Juris Ecclesiastici Anglicani.*
Hag. Cons. . .	Haggard's Consistory Reports, 1729–1821.
Hag. Eccl. . .	Haggard's Ecclesiastical Reports, 1827–1832.
H. & C. . . .	Hurlstone & Coltman's Reports (Exchequer) 1862–66.
H. L. C. . . .	House of Lords Cases, 1847–66.
Hob.	Hobart's Reports, 1611–20.
Ir. Ch. Rep. App. . . .	Irish Chancery Reports (Appendix).
J. & H. . . .	Johnson & Hemming's Reports (Chancery) 1859–62.
J. P.	Justice of the Peace, 1837 onwards.

Johns.	John Johnson's Clergyman's Vade Mecum, 6th ed., 1731.
Jur.	Jurist (Reports) 1837–54.
Jur. N. S. . .	Jurist, New Series (Reports) 1855–66.
K. B.	Law Reports (King's Bench) 1901 onwards.
L. J. (*Ch.*, *C. P.*, *Ex.*, *Q. B.*) .	Law Journal 1823–31; New Series 1832 onwards (Chancery, Common Pleas, Exchequer, Queen's Bench).
L. J. Eccl. . .	Ditto (Ecclesiastical Cases).
L. J. M. C. . .	Ditto (Magistrates' Cases).
L. J. P. M. & A.	Ditto (Probate, Matrimonial, and Admiralty Cases).
L. R. A. & E. .	Law Reports, 1865–75 (Admiralty and Ecclesiastical).
L. R. C. P. Ex. Q. B. . . .	Ditto (Common Law).
L. R. Ch. . .	Ditto (Chancery Appeals).
L. R. Eq. . .	Ditto (Equity).
L. R. H. L. . .	Ditto (House of Lords).
L. R. H. L. Sc. .	Ditto (Scotch and Divorce Appeals).
L. R. P. C. . .	Ditto (Privy Council).
L. T. N. S. . .	Law Times (New Series) Reports, 1859 onwards.
M. & S. . . .	Maule & Selwyn's Reports (King's Bench) 1813–17.
M. & W. . .	Meeson & Welsby's Reports (Exchequer) 1836–47.
Marsh. . . .	Marshall's Reports (Common Pleas) 1813–1816.
Mer.	Merivale's Reports (Chancery) 1815–17.
Moo. P. C. . .	Moore's Privy Council Reports, 1836–62.
Moo. P. C. N. S.	Ditto, New Series, 1862–73.
N. R.	New Reports (Equity and Common Law) 1862–65.
Not. of Ca. . .	Notes of Cases (Ecclesiastical and Maritime) 1841–50.
P.	Law Reports, Probate Division, 1891 onwards.
P. D.	Law Reports, Probate Division, 1875–90.
Phill.	Phillimore's Reports (Ecclesiastical) 1809–1821.
Phill. Eccl. Law	Phillimore's Ecclesiastical Law of the Church of England, 2 vols., 2nd ed., 1895.
P. Wms. . . .	Peere Williams' Reports (Chancery) 1695–1735.

Q. B.	Queen's Bench Reports (Adolphus & Ellis) 1841–52.
Q. B.	Law Reports (Queen's Bench) 1891–1900.
Q. B. D. . . .	Law Reports (Queen's Bench Division) 1875–1890.
Rob. Eccl. . .	Robertson's Reports (Ecclesiastical) 1844–1853.
Sc. L. R. . .	Scottish Law Reporter, 1865 onwards.
Sm. Churchw. .	Smith's Law of Churchwardens and Sidesmen in the Twentieth Century (Wells, Gardner, & Co., 2s.).
Str.	Strange's Reports, 1715–47.
Strype's Annals	John Strype's Annals of the Reformation (ed. 1824) 4 vols.
Sw. & Tr. . .	Swabey & Tristram's Reports (Probate and Divorce) 1858-65.
Taun.	Taunton's Reports (Common Pleas) 1807–1819.
Times Law Rep.	Times Law Reports, 1884 onwards.
T. R.	Durnford & East's Term Reports (King's Bench) 1785–1800.
Trist. Cons. Judgm. . .	Tristram's Consistory Judgments, 1872–90.
Ventr.	Ventris' Reports (King's Bench) 1668–91.
Ves.	Vesey Junior's Reports (Chancery) 1789–1816.
Wats.	Watson's Clergyman's Law, 4th ed., 1747.
Willes	Willes Reports (Common Pleas) 1737–58.
Wils.	Wilson's Reports (Common Law) 1743–74.
W. R.	Weekly Reporter, 1853 onwards.
Yo. & Jer. . .	Younge & Jervis's Reports (Exchequer) 1826–30.

CHAPTER I

GENERAL LEGAL POSITION

1. In every country where a Christian Church is permitted to exist, the power and authority of her clergy to exercise their functions will rest upon a triple basis and be subject to twofold restrictions and limitations. In the first place, (i.) they derive their spiritual authority from their ordination, and this authority is independent of the particular Church to which they belong. But, in the next place, they are bound on the one hand (ii.) to obey the regulations of the Church of which they are the ministers, and must also, on the other hand, (iii.) conform to the laws of the country in which they labour. For they can only actively exercise their functions by the licence or permission of the ruling power of that country, and subject to any conditions which it may choose to impose. These principles apply equally whether the Church is what we call established or not. The only difference is that if the Church is established, her own regulations are part of the law of the land; whereas, if she is not established, the law of the land

sanctions or suffers the existence of these regulations as a private contract or arrangement between the ministers and other members of the Church. But even in the case of an established Church, her ministers will obviously be restricted in the exercise of their functions by civil regulations which do not form part of the ecclesiastical law. Thus there may be nothing in the law of his Church to prevent a clergyman from holding a religious service or preaching in a crowded thoroughfare. But in England and other civilised countries any attempt to do so would be checked by the existing laws against the obstruction of highways. In the following pages no attempt will be made to point out the non-ecclesiastical laws and limitations to which a parish priest is subject. For though they necessarily affect himself and his spiritual work, they do so only indirectly. They touch him not as a minister or even as a Christian, but as a citizen; and they touch his spiritual work only in so far as that work has a material and civil element.

2. Confining then our attention to the ecclesiastical law under which the parish priest holds his position and acts in this country, we note in the first place, that the Church being here established, this ecclesiastical law is equally the law of the Church and the law of the State. This is true whatever be its origin, and however

it came into force; and it has always had this double aspect, since (with the exception of the brief interval of the Commonwealth—a period which is not recognised in our jurisprudence as having had any legal existence) there never has been a time in our history when the Church of England has not been the Established Church of the nation. Portions of our Church system and Church law have had an exclusively ecclesiastical origin, by canon or otherwise, and have been adopted or acquiesced in by the State. Further portions have been created by the joint or concurrent action of the Church and the State. Other portions again have been due to the sole action of the civil legislature, which has received the tacit assent of the Church but has never been confirmed by any formal ecclesiastical ratification. From whichever of these three sources any particular point of our Church law may have been derived, its validity and obligation is the same. It binds the Church and her ministers and members irrespectively of its origin, and is at present in force unless it has either been formally repealed or become obsolete and fallen into desuetude.

3. Again, like our civil law, our ecclesiastical law is in part written and in part unwritten or customary. Foreign canon or conciliar law or papal law is only binding in England so far as it has been received by immemorial custom, and

has thus become part of our unwritten law, or has been incorporated into our written law by the ratification of an Act of Parliament, or a canon or constitution of our own Church ; and the binding force of the English Pre-Reformation canons, ordinances, and provincial constitutions stands on the same footing. For the Commission authorised by the Act for the Submission of the Clergy of 1533 to examine the English canons and constitutions, and, with the king's assent, declare which of them should be in force and which should be abrogated, was never appointed, although the time for its appointment was extended by Acts of 1535 and 1543, and the scope of its inquiry was extended by the latter Act so as to include foreign canons and ordinances.[1] Consequently the only written Church law is to be found in Acts of Parliament and the Prayer-Book,[2] and in Post-Reformation canons, which,

[1] 1 Bl. Comm. 14, 79–83, and n. (11) by J. T. Coleridge (afterwards Judge) in 16th ed. (1825); (1533) 25 Hen. 8, c. 19, ss. 1–3 ; c. 21 (preamble) ; (1535) 27 Hen. 8, c. 15 ; (1543) 35 Hen. 8, c. 16.

[2] *i.e.* "The Book of Common Prayer and Administration of the Sacraments and other Rites and Ceremonies of the Church, according to the use of the Church of England, together with the Psalter or Psalms of David, pointed as they are to be sung or said in Churches, and the Form or Manner of making, ordaining, and consecrating of Bishops, Priests, and Deacons," which is annexed to the Act of Uniformity of 1662 (14 Cha. 2, c. 4). Similarly the Thirty-Nine Articles of Religion are enjoined on the clergy by (1571) 13 Eliz. c. 12, the Clerical Subscription Act, 1865 (28 & 29 Vict. c. 122), and the Canon made in 1865 and ratified by the Crown in 1866.

however, except so far as they are confirmed by Act of Parliament, or declare the unwritten law of the Church, are only binding on the clergy.[1] Of these the chief are those known as the Canons of 1603, which were agreed upon at the sitting of the Canterbury Convocation begun in that year, and were separately passed two years afterwards by the York Convocation. Many portions of them are, however, now obsolete; and Canon 36 and the last words of Canon 102 have been superseded by new canons made in 1865–66 and 1888. The Canons of 1640 were passed after the dissolution of Parliament, which, according to the custom of the realm, put an end also to the existence of Convocation, and they have no legal force.[2]

4. Much discussion has arisen upon a fourth source of Church law, namely, the decisions of our ecclesiastical courts. It is important to draw a clear distinction between legislative and judicial functions. A court, whether ecclesiastical or civil, has nothing to do with enacting laws. Its province is confined to interpreting them,

[1] Middleton *v.* Crofts (1736) 2 Str. 1056; 2 Atk. 650; Bp. of Exeter *v.* Marshall (1868) L. R. 3 H. L. 17.

[2] Gibs. Cod. 956. The Act of 1661 (13 Cha. 2, st. 1, c. 12), which restored the ecclesiastical jurisdiction of archbishops, bishops, and other spiritual judges and officers, contained a proviso that nothing therein contained should extend to confirm "the canons made in the year 1640, nor any of them, nor any other ecclesiastical laws or canons not formerly confirmed, allowed, or enacted by Parliament or by the established laws of the land as they stood in the year of our Lord 1639."

when their meaning is obscure or disputed. No doubt, in the course of this interpretation, it will sometimes make law by deciding in a particular way a point on which the legislature has left the matter in doubt, and has not itself clearly laid down the law. Many questions affecting the clergy and the Church have, in fact, been thus determined by our civil as well as by our ecclesiastical tribunals. But if one of our civil courts, in interpreting the civil law, delivers a decision which does not commend itself to the common sense of the nation, it is recognised that the remedy lies not in altering the constitution of the court and endeavouring to obtain a fresh legal decision which shall upset the other, but in obtaining an Act of Parliament expressly overruling the unsatisfactory decision. If this is not done, the law may have been technically judge-made, but it is acquiesced in and assented to by Parliament and the nation. The same principle applies to the decisions of ecclesiastical courts. The natural way of getting rid of an obnoxious decision is not by fresh adjudication, but by legislation. Until it has been reversed by one or other of these means, the decision of a court, which *de facto* possesses ecclesiastical jurisdiction, is binding upon the Church as part of her law for the time being. We have somewhat lost sight of this principle, owing to the extreme difficulty of obtaining any definition or alteration of Church

law by a legislative process. But the true remedy lies in a healthy revival of the exercise of ecclesiastical legislation, and not in an endeavour to make the ecclesiastical judicature, whether as now existing or after a reform of the courts, discharge legislative functions which are wholly outside its proper province.

5. The legal position of the parochial clergy depends for its ultimate origin upon the legal status of the ancient *Parish*. The word is the English form of the Greek *παροικία* (habitation), and the Latin *parochia*, an expression originally synonymous with diocese (Gr. *διοίκησις*, *i.e.* administration; Lat. *diœcesis*, used of a district or part of a province in the Roman Empire), and applied to the territory assigned to the jurisdiction of a bishop, which was served by him and a college of clergy under him. But under Archbishop Theodore (668–690) or shortly after his time the process was begun of encouraging the lords of manors and great landowners to build churches for themselves and their dependants, and devote the tithes of their manors or estates to the maintenance of divine worship in these churches, and the performance of religious duties among the residents on the estates. This process was gradually extended throughout the country, and, wherever it was adopted, the tithes were assigned either to the priest for the time being in charge of the church, who was in that case

called the *rector* (governor of the church) or *parson* (Lat. *persona*),[1] or to a monastery, the members of which were then expected to serve the church. The manor or estate, including any detached and outlying portions, became the parish of the church, and developed into a territorial unit not only for ecclesiastical but also for many civil purposes. Where the church was served by a single rector, the landowner who had endowed it and his successors after him were given in return the right of nominating to the bishop a clerk in Holy Orders to become rector of the church, or, in other words, they acquired the *patronage* or *advowson*[2] of the benefice. The frequent cases of neglect in the service of the parish, where a monastery was rector, led, in the thirteenth century, to the requirement that in such cases a succession of individual priests should be appointed to discharge the duty, with a definite portion of the endowments of the benefice as their stipend for so doing. As a rule the great tithes, being those of corn, grain, hay, and wood,

[1] So called "because by his person the church, which is an invisible body, is represented: and he is in himself a body corporate in order to protect and defend the rights of the church (which he personates) by a perpetual succession." 1 Bl. Comm. 384. The term *parson* is often popularly, but incorrectly, applied to vicars and other clergymen.

[2] The owner of this right was called the *patronus* or *advocatus* on account of his duty to patronise, advocate, or defend the privileges of the church and benefice. Hence his right to nominate the rector was styled *advocatio* or advowson.

were reserved to the monastery, and were in consequence styled rectorial tithes, while the officiating priest, who was styled a *vicar*, was endowed with the remaining or small tithes, which consequently were called vicarial. But in a few instances the officiating priest, instead of becoming entitled to the small tithes, only received a fixed monetary stipend. Where this occurred, he was called a *perpetual curate*. It was the rule that rectories, whether in the hands of a monastery or a succession of individual priests, should be endowed not only with the tithes of the parish, but also with a house and lands, which are called glebe; and sometimes these houses and lands, or a part of the lands, were assigned towards the stipend of the vicar.

6. Towards the close of Henry VIII.'s reign the monasteries were dissolved, and their rectories and the rectorial tithes of the parishes and other endowments attached thereto, and the right of nominating vicars or perpetual curates to the parishes passed, with the rest of the monastic property, in some cases into the hands of the Crown or of private individuals who received grants of them from the Crown, while in other cases they went to the endowment of episcopal sees or of colleges, hospitals, or other public institutions. Whichever happened, the rectory and rectorial tithes became thenceforth *impropriate*, and the vicar or

perpetual curate was left with the vicarial tithes and other endowments, or a stipend, as the case might be, to serve the parish as the beneficed parish priest. Later on, and particularly during the nineteenth century, the growth of the population and the rapid increase of our urban centres, owing to the steady migration from the villages to the towns, has rendered the building of new churches and the creation of new ecclesiastical areas a matter of pressing importance; and the same causes have necessitated the employment in the larger parishes of additional clergy, whether stipendiary or voluntary. In some cases an old parish has been divided into distinct and separate parishes, each of which has received a portion of the old church endowments, and has become a rectory, vicarage, or perpetual curacy, according to the *status* of the old parish:[1] or a vicarage has been converted into a rectory upon a surrender of the rectorial tithes by the impropriator.[2] But, as a rule, new ecclesiastical districts or parishes have been formed and churches built without resorting to the old endowments; and the Church Building and New Parishes Acts provided that the ministers put in charge of these new districts or parishes and churches should be perpetual curates, and should, like the old rectors, vicars, and perpetual curates, be corporations, with

1 (1818) 58 Geo. 3, c. 45, ss. 16–19.
2 (1822) 3 Geo. 4, c. 72, ss. 13, 14.

perpetual succession.[1] But in 1868 it was enacted that the incumbent of every parish and new ecclesiastical parish, who was authorised to publish banns, and solemnise marriages, churchings, and baptisms in his church, and was not a rector, should, for the purpose of designation only, be styled a vicar, and his benefice should for the same purpose be styled a vicarage.[2] The modern

[1] (1818) 58 Geo. 3, c. 45, s. 25; (1831) 1 & 2 Will. 4, c. 38, s. 12; (1839) 2 & 3 Vict. c. 49, ss. 2, 8; (1845) 8 & 9 Vict. c. 70, ss. 9, 17. The churches provided under the Church Building Acts and New Parishes Acts may be classified as follows: i. Church of a distinct and separate parish formed under the Church Building Act, 1818 (58 Geo. 3, c. 45, s. 76); ii. Church of a district parish formed under 58 Geo. 3, c. 45, s. 21; iii. Church or chapel of a consolidated chapelry formed under the Church Building Act, 1819 (59 Geo. 3, c. 134, s. 6); iv. Church or chapel of a district chapelry formed under 59 Geo. 3, c. 134, s. 16; v. Church or chapel built or appropriated under the Church Building Act, 1831 (1 & 2 Will. 4, c. 38, s. 2), with or without a particular district formed under s. 10 of that Act; vi. Chapel of ease constituted the church of a separate spiritual parish under 1 & 2 Will. 4, c. 38, s. 23; vii. Church of a Peel parish formed under the New Parishes Act, 1843 (6 & 7 Vict. c. 37, s. 15); viii. Church of a new parish formed under the New Parishes Act, 1856 (19 & 20 Vict. c. 104, ss. 1, 2); ix. Church of a district parish, consolidated district chapelry, or particular district, which under 19 & 20 Vict. c. 104, s. 14, has become a separate ecclesiastical parish in consequence of the Ecclesiastical Commissioners having authorised in such church the publication of banns and the solemnisation of marriages, churchings, and baptisms; x. Church, without a district, built on a site the conveyance of which has been accepted by the Ecclesiastical Commissioners (8 & 9 Vict. c. 70, s. 7).

[2] 31 & 32 Vict. c. 117, s. 2. Under the Parish of Manchester Division Act, 1850 (13 & 14 Vict. c. 41, s. 2), the benefice of every new parish within the area of the ancient parish of Manchester is a rectory.

generic title, which includes every beneficed parish priest, is *incumbent*. The proper and ancient term for rectors, vicars, and all other parochial clergy, whether beneficed or unbeneficed, is *curate*, as having the cure of souls within the parish.[1] But in modern practice this term, when used by itself, is generally applied to the unbeneficed or assistant curates in a parish.

7. Two other classes of parochial clergy remain to be mentioned. Where, for any reason, the incumbent is for a prolonged period disabled from performing the duties of his office, a substitute will be appointed under the designation of Minister in Charge. Again, in some parishes, lectureships have been endowed, and are held by a lecturer, who, in respect of his duties as such, is independent of the incumbent.

8. Under the Colonial Clergy Act, 1874, a priest or deacon (i.) not ordained by an English or Irish or Scottish bishop, or a bishop acting on the request and under the commission of an English bishop, or (ii.) ordained for service out of the British dominions or for service in the colonies by either of the two archbishops or the Bishop of London,[2] (*a*) cannot, unless he holds or has held preferment or a curacy in England, officiate in any church or chapel in England

[1] See the Prayer for the Clergy and People in Morning and Evening Prayer and the Prayer for the Church Militant.

[2] (1784) 24 Geo. 3, sess. 2, c. 35, s. 1; (1819) 59 Geo. 3, c. 60, s. 1.

without the written permission of the archbishop of the province, and without making and subscribing a declaration similar to the Declaration of Assent prescribed by the Clerical Subscription Act, 1865;[1] and (*b*) is not entitled to be admitted to any preferment or to act as curate in England without the previous consent in writing of the bishop of the diocese. But a person who holds preferment or a curacy in an English diocese under the Act of 1874, and who has held preferment or acted as curate for a period or periods exceeding in the aggregate two years, may, with the written consent of the bishop, request from the archbishop of the province a licence to exercise his clerical office according to the provisions of the Act; and this licence, if issued by the archbishop and registered in the provincial registry, will place him in the same position as if he had been ordained for service in England by an English bishop.[2] Moreover, a clergyman ordained by a bishop of the Scottish Episcopal Church, unless he holds or has previously held preferment in England or Ireland, (*a*) is liable to a penalty if he officiates in England more than once within three months without notification to the bishop of the diocese, or if he officiates contrary to an injunction of the bishop; and (*b*) is not entitled to be admitted to

[1] 28 & 29 Vict. c. 122, s. 4. See ch. ii. § 6 (i.) below.
[2] (1874) 37 & 38 Vict. c. 77.

any preferment in England without the bishop's consent, which he may withhold without assigning any reason; and (*c*) before being admitted or licensed to any preferment or curacy in England, must make and subscribe before the bishop of the diocese, the Declaration of Assent prescribed by the Clerical Subscription Act, 1865.[1]

9. All rectories, vicarages, and perpetual curacies, whether ancient or established under the Church Building and New Parishes Acts, or under any special Act of Parliament, fall within the term *benefice*, and are of freehold tenure. The term is also applied to non-parochial ecclesiastical offices of a like tenure, such as a deanery, canonry, and archdeaconry. But in the present treatise, which deals only with the parochial clergy, it will be used exclusively of the above-named parochial benefices (which are in popular language called *livings*); and the clergy who hold these benefices will be called beneficed clergy or incumbents. The other parochial clergy will be referred to as unbeneficed clergy or curates. The legal position of the unbeneficed clergy as regards status and property is so different from that of incumbents that it will be convenient to treat of them separately. But the spiritual duties of the two classes, and the discipline to which they are amenable, are similar and can be discussed

[1] (1864) 27 & 28 Vict. c. 94. See (1865) 28 & 29 Vict. c. 122, s. 4; ch. ii. § 6 (i.) below.

together. They are alike subject to the same superior ecclesiastical officials and to the same judicial proceedings; and their civil privileges and disabilities in respect of their clerical office are identical. By virtue of their position as parochial clergy they are brought into certain relations with the bishop of the diocese, the archdeacon of the archdeaconry, and the rural dean of the deanery in which their parish is situate.

10. The bishop is not only the ruler and administrator, but also the chief pastor of the whole of his diocese. As such, he, assisted by his chaplain, has the right whenever he pleases, without the consent of the incumbent, to conduct service or preach in the church of any parish in such lawful manner as he thinks proper. This right extends to consecrating a church within the parish [1] and, of course, to holding ordinations and confirmations. Moreover, he can require from the clergy all reasonable information respecting their parish and parishioners. They owe to him canonical obedience,[2] and deference in matters which do not fall within the limits of obedience. With the exception that his withdrawal of a licence from a curate is subject to an appeal to the archbishop, he possesses absolute control over the unbeneficed clergy in his diocese, having the right to inhibit them from officiating within it. But

[1] Bp. of Winchester *v.* Rugg (1868) L. R. 2 P. C. 223, 230.
[2] As to this, see ch. ii. § 6 (iv.) and note.

he has no such power over the beneficed clergy in respect of their services in their own church and other matters involved in the cure of souls attaching to their benefice. In respect of these matters, their office being a freehold for life, they are independent of him except in such particulars and to such extent as the law has expressly prescribed, and they can only be constrained by him against their will through the instrumentality of legal proceedings. But, equally with the unbeneficed clergy of the diocese, it is their duty to attend the bishop's triennial visitations; and their absence without sufficient cause renders them liable to ecclesiastical censure and punishment. Moreover, as will be noticed in the course of this treatise, the bishop has been given, by express enactments, divers powers in relation to both beneficed and unbeneficed clergy on matters of detail, subject in many cases to an appeal to the archbishop of the province. By law and custom part of the administrative functions of the bishop and almost the whole of his judicial functions are discharged by his chancellor, who is at once his vicar-general and the official principal of his consistory court. Suffragan bishops, where they are appointed, have no independent authority or jurisdiction, but simply so much as the diocesan bishop, in his discretion, from time to time delegates to them.

11. The archdeacon is in his archdeaconry next in point of dignity after the bishop and the suffragans (if any) and the chancellor of the diocese.[1] He is sometimes called *oculus episcopi*, being the bishop's vicar, charged with the duty of inspecting that portion of the diocese which is under his charge and of reporting to the bishop anything which is amiss. Besides this general supervision, he holds an annual visitation of his archdeaconry, and admits the churchwardens and sidesmen, except in years of episcopal visitation, when he is inhibited from performing his functions, and these are exercised instead by the bishop in person, or, as regards the admission of churchwardens and sidesmen, by the chancellor.[2] At his annual visitation, and at other times, as occasion arises, it is the business of the archdeacon to satisfy himself that churches, and especially chancels, are in a proper condition, and to require that any necessary repairs be executed; to take note of the ornaments and utensils of churches, and to ascertain that the services and offices of the Church are everywhere duly performed and administered. The clergy are bound to assist the archdeacon in his inspection and inquiries and to

[1] Ayl. Par. 95. The Dean of the Cathedral has an independent position and dignity in respect of the Cathedral Church, which is outside the general diocesan and archidiaconal jurisdiction; *Ib.*

[2] Reg. *v.* Sowter (1901) 1 K. B. 66; rev., 396.

attend his visitations.[1] Various duties assigned to him by statute are noticed in subsequent chapters.

12. Rural deans have within their deaneries the same functions and powers of inspection and report as an archdeacon in his archdeaconry. It is their duty to hold from time to time chapters consisting of the beneficed clergy of the deanery or their curates as proxies for them. In the present day these chapters are usually attended not only by the incumbents but also by all the licensed unbeneficed clergy of the deanery.[2]

13. Judicial procedure in the case of clerical offences is regulated by three statutes of the last century: (i.) The Church Discipline Act, 1840,[3] provides that on a complaint or the existence of evil report against a clergyman the bishop may, with the consent of the parties, at once pronounce sentence, and, in the absence of such consent, may, if he thinks fit, issue a commission of inquiry. If the commission reports that there is *primâ facie* ground for proceedings, the bishop may either

[1] Phill. Eccl. Law, Pt. i. ch. v. pp. 194–207 ; Pt. iv. ch. xi. § 3, pp. 1051–1054 ; 1 Burn, 93–97. According to a table of fees settled under the authority of the Act 30 & 31 Vict. c. 135, and published in the *London Gazette* of March 19, 1869, the fees to be paid by each parish at either an episcopal or an archidiaconal visitation are 18s. ; viz. 2s. to the chancellor or archdeacon (as the case may be), 12s. 6d. to the registrar, and 3s. 6d. to the apparitor.

[2] Ayl. Par. 205 ; Gibs. Cod. 971–973 ; 2 Burn, 119–125 ; Dansey's *Horæ Decanicæ Rurales* (2nd ed., 1844), Pts. iv, v.

[3] 3 & 4 Vict. c. 86.

try the case in person with assessors, or else send it by letters of request direct to the provincial court. The latter course has in practice been generally adopted, and an appeal may be carried to the Judicial Committee of the Privy Council. (ii.) The Public Worship Regulation Act, 1874,[1] introduced an alternative procedure in matters of ornament and ritual. On the representation of the archdeacon or a churchwarden or any three parishioners, the bishop, unless he is of opinion that no proceedings should be taken upon it, is to require the parties to state whether they are willing to submit to his directions in the matter, and if they assent he is to hear the case and pronounce judgment as he thinks proper, and no appeal is to lie from his judgment. But if they decline to submit the case to the bishop, it is to be heard by the judge appointed under the Act, who is in fact the same person as the judge of the two provincial courts, and an appeal lies from his decision to the Judicial Committee. (iii.) The Clergy Discipline Act, 1892,[2] prescribed a new mode of dealing with offences against morality. In certain cases where the offence is proved by a conviction and sentence or an order of a temporal court, the offending clergyman is to be incapable of holding preferment, and the bishop is to declare vacant any preferment which he holds without any further trial. But in all other cases proceed-

[1] 37 & 38 Vict. c. 85. [2] 55 & 56 Vict. c. 32.

ings are to be taken in the consistory court before the chancellor of the diocese, with the addition of four assessors to try any question of fact, if either party demands them. Either party may appeal against the judgment of the consistory court on a question of law, and the accused clergyman may, with the leave of the appellate court, appeal on a question of fact. The appeal may at the option of the appellant be either to the provincial court or to the Judicial Committee of the Privy Council, but if it is made to the provincial court the decision of that court is final. The net result of the three Acts is that (i.) offences of the clergy in respect of morality can only be dealt with under the Act of 1892; (ii.) proceedings for offences in respect of ritual and the ornaments of the church or the minister may be taken either under the Act of 1840 or under that of 1874; and (iii.) offences in respect of doctrine, as well as all other offences which do not come under (i.) or (ii.), must be dealt with under the Act of 1840.

14. Priests, at their ordination, are reminded of their duty to forsake and set aside, as much as possible, all worldly cares and studies, and are exhorted to apply themselves wholly to their sacred office, and draw all their cares and studies that way; and they promise, among other things, to lay aside the study of the world and the flesh. No similar expressions occur in the form for the making of deacons; but our law recognises

no distinction between the two orders of clergy in respect of their civil privileges and disabilities.

15. A clergyman, whether priest or deacon, is not compellable to serve on a jury, though it is not illegal for him to do so. He may be appointed a justice of the peace or guardian of the poor, may be a member of a parish or district council, and may act as chairman, alderman, or councillor of a county council, and as mayor, alderman, or councillor of any of the Metropolitan boroughs. But he is disqualified from being mayor, alderman, or councillor of any other municipal borough;[1] and he cannot be elected a member of the House of Commons;[2] though, if he is a peer, he may sit in the House of Lords.

16. Canon 75 not only forbids ecclesiastical persons to resort, except for their honest necessities, to taverns or alehouses, or to board or lodge therein, or to spend their time in drinking or riot or playing at dice, cards, or tables, or any other unlawful games, but also prohibits them from engaging in any base or servile labour. And a clergyman who holds any cathedral preferment, benefice, curacy, or lectureship, or is licensed

[1] Cripps, 67, 68; (1882) 45 & 46 Vict. c. 50, ss. 12 (1) (*b*), 14 (3); (1888) 51 & 52 Vict. c. 41, s. 2 (2) (*a*); (1899) 62 & 63 Vict. c. 14, s. 2 (4), (5).

[2] (1801) 41 Geo. 3 (U. K.), c. 63.

or is otherwise allowed to perform the duties of any ecclesiastical office, is subject to certain specific legal restrictions as to engaging in business or trade. (*a*) He may not acquire for occupation, use, or cultivation more than eighty acres of land without the written permission of the bishop, which must be restricted to a specified number of years not exceeding seven. (*b*) He may not engage in any trade or dealing for profit except where it is carried on by more than six partners, or by a company, or where the concern, or a share in it, has devolved on him under a will or settlement, or by inheritance or marriage or bankruptcy; and in none of the excepted cases may he act as a director or managing partner, or carry on the concern in person. These restrictions, however, do not extend to keeping a school or seminary, or being employed as a schoolmaster or tutor, or being concerned in education for profit, or buying or selling or otherwise acting in relation to such school, seminary, or employment. Nor of course do they prevent an incumbent from farming, if he pleases, his own glebe lands. Nor do they interfere with the sale, even at an enhanced price, of goods which a clergyman actually buys for the use of his household, but afterwards does not want to keep, nor with the sale of books to or through a bookseller or publisher. He may also be a manager, director, partner, or shareholder in any benefit

society, or fire or life assurance society, and may sell minerals from mines on his own lands, and also (provided he do not do so in person at a market or other public sale) may buy and resell for profit cattle, corn, and other things required for the occupation, cultivation, and improvement of glebe or other lands lawfully held by him. The penalties for unlawfully trading are, for the first offence, suspension for not exceeding one year, for the second offence suspension for a longer period, and for the third offence deprivation *ab officio et beneficio*.[1]

17. Both clergymen and other ministers of religion are specially protected in the performance of religious rites, including rites of burial, in a church or other place of worship, or a churchyard or burial-place. It is a misdemeanour punishable by imprisonment with or without hard labour, to offer violence to them or arrest them upon any civil process while engaged in or going to or returning from the performance of these rites, or to obstruct or endeavour to obstruct them in the performance.[2] The maintenance of order in a church or other place of worship, whether Divine service is being performed or not, and in a churchyard or burial-place, is also pro-

[1] (1838) 1 & 2 Vict. c. 106, ss. 28, 31 ; (1841) 4 & 5 Vict. c. 14.

[2] (1861) 24 & 25 Vict. c. 100 (Offences against the Person), s. 36.

vided for by the Act against brawling passed in 1860.[1]

18. A clergyman cannot divest himself of his orders;[2] and Canon 76 prohibited him from forsaking his calling or conducting himself as a layman under pain of excommunication. But now, by statute, after resigning all preferments held by him, he can surrender all clerical rights and powers, and free himself from all clerical disabilities, if he executes a deed of relinquishment in the prescribed form, and causes it to be enrolled in the Central Office of the Supreme Court of Judicature, and delivers an office copy of the enrolment to the bishop of the diocese in which he last held preferment, or (if he has never held preferment) in which he resides, and gives notice of having done so to the archbishop of the province in which the diocese is situate. And a clergyman who takes this course is relieved from all censures or other proceedings for so doing, but is rendered incapable of afterwards officiating or acting as a minister of the Church of England or taking or holding any preferment therein.[3]

[1] 23 & 24 Vict. c. 32.
[2] Barnes *v.* Shore (1846) 8 Q. B. 640; 1 Rob. Eccl. 382.
[3] 33 & 34 Vict. c. 91 (The Clerical Disabilities Act, 1870).

CHAPTER II

BENEFICED CLERGY

1. In the case of all benefices, admission is granted by the bishop, as primarily charged with the cure of souls throughout his diocese; but, unless there is good legal reason to the contrary, he is bound to admit the clerk who is presented by the patron of the benefice, if the presentation is made within six calendar months after the benefice became vacant. If that period passes without a presentation being made, the right of appointment lapses to the bishop. If he does not appoint within a further like period, it goes to the archbishop of the province, and if he fails to appoint within another period of six calendar months, it devolves finally on the Crown.[1] The period for lapse dates from the day of the vacation of the benefice if it occurred by death or acceptance of another living.[2] But if the vacancy was created by resignation or deprivation or avoidance of the benefice for non-residence, or if a clerk who is presented is rejected for want of

[1] Wats. ch. xii. pp. 109–120; Gibs. Cod. 768–770.
[2] Wats. ch. ii. pp. 5, 6; Gibs. Cod. 769.

ability or moral character, the period will only begin to run from the time when notice of the fact is given by the bishop to the patron,[1] except in the case of an ecclesiastical patron who (unless the case comes under the Benefices Act, 1898, ss. 2, 3) is not entitled to such notice.[2] Moreover, in reckoning the period for lapse, no account is to be taken, in the case of the first and second presentations by a patron in respect of the same vacancy, of the time between a presentation and the bishop's refusal to admit the presentee, or of the period between that refusal and a decision of a court upon it, nor, in the case of a collation by the bishop, of the time between the service of the prescribed notice on the churchwardens and the expiration of a month from that service.[3]

2. The original connection of advowsons or rights of presentation with manors or estates[4] led to their passing by devolution or devise on death, or by gift or sale during life, to the heir of the patron, or to a devisee, donee, or purchaser of the manor or estate; and it soon became recognised in law that they could be alienated by themselves like any other property, apart from the

[1] Wats. ch ii. p. 6; Gibs. Cod. 769; (1571) 13 Eliz. c. 12, s. 7; (1838) 1 & 2 Vict. c. 106, s. 108.

[2] 2 Burn, 357.

[3] Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 5. Comp. §§ 4, 5 below.

[4] See ch. i. § 5.

manors to which they were originally appendant. Moreover, until 1899 the law allowed a patron to grant or sell the right of next presentation, or the right of presentation during his lifetime, or any other limited interest in the patronage, reserving the fee-simple of the advowson to himself. By an Act of 1713,[1] a clergyman was prohibited from purchasing a next presentation and then presenting himself; but this has been held not to prevent him from presenting himself after purchasing an estate in fee, or even an estate for life in the advowson.[2] And if the benefice is vacant at the time of the transfer, the transfer does not carry with it the right to present a clerk to fill up the existing vacancy.[3] This, however, was, until 1899, frequently got over by an agreement that the transferor should present such clerk as the transferee might nominate. But the Benefices Act, 1898,[4] introduced several salutary restrictions on the transfer of advowsons. Under sect. 1 of that Act:—

(*a*) A transfer of an advowson (otherwise than on marriage, death, or bankruptcy, or on the appointment of a new trustee) is invalid unless it (i.) transfers the whole interest of the transferor in the advowson (except that he may reserve to himself a life interest in making a family settle-

[1] 13 Ann. c. 11 (12 Ann. st. 2, c. 12), s. 2.
[2] Walsh *v.* Bp. of Lincoln (1875) L. R. 10 C. P. 518.
[3] Alston *v.* Atlay (1837) 7 A. & E. 289.
[4] 61 & 62 Vict. c. 48.

ment, and the equity of redemption in making a mortgage); (ii.) is made more than twelve months after the last filling up of the benefice; and (iii.) is registered in the diocesan registry within one month after its date, or such extended period as the bishop may under special circumstances permit.

(*b*) The advowson must not be put up to auction unless sold with a manor or not less than 100 acres of land belonging to the same owner in the same or an adjoining parish.

(*c*) Subsection (3) of the same section also makes invalid any agreement to exercise patronage in favour of or on the nomination of a particular person, and also, in connection with the transfer of an advowson, any agreement (i.) to retransfer the advowson; (ii.) to postpone payment of any part of the purchase money, or to pay interest until a vacancy in the living, or for more than three months; (iv.) to make any payment in respect of the date at which the vacancy may occur; or (v.) that the living shall be resigned in favour of any person. If the patron of a benefice is a Roman Catholic, the University of Oxford or of Cambridge has the right to present.[1] A Jew who owns an advowson may present; but if a Jew holds an office under the Crown to which a right of presentation is attached, the right passes to the Archbishop of Canterbury.[2]

[1] (1605) 3 Ja. 1, c. 5, ss. 19–21; (1688) 1 Will. & Mar. sess. 1, c. 26; (1898) 61 & 62 Vict. c. 48, s. 7.

[2] (1858) 21 & 22 Vict. c. 49, s. 4.

3. Every clerk in priest's orders, who has not relinquished the rights and privileges attaching to those orders under the Clerical Disabilities Act, 1870,[1] or become incapable of holding preferment under the Clergy Discipline Act, 1892,[2] is qualified to be appointed to a benefice. But, unless he has been so ordained by a bishop of the Church of England or of the Church of Ireland, or by a commissary of an English bishop under 15 & 16 Vict. c. 52, he is subject to the provisions of the Colonial Clergy Act, 1874,[3] or, if ordained in Scotland, of the Episcopal Church (Scotland) Act, 1864,[4] as to the previous consent or licence of the archbishop of the province or bishop of the diocese; and a clerk ordained priest as an alien or for service in the colonies under the Ordination of Aliens Act, 1784, or the Ordinations for Colonies Act, 1819, is subject to the same provisions.[5] The bishop may, however, independently of the Benefices Act, 1898, refuse to admit him on the ground of insufficient learning,[6] or of

[1] 33 & 34 Vict. c. 91.
[2] 55 & 56 Vict. c. 32, ss. 1, 6.
[3] 37 & 38 Vict. c. 77. See ch. i. § 8.
[4] 27 & 28 Vict. c. 94. See ch. i. § 8.
[5] 24 Geo. 3, sess. 2, c. 35; 59 Geo. 3, c. 60; 37 & 38 Vict. c. 77, s. 9.
[6] Willis *v.* Bp. of Oxford (1877) 2 P. D. 192. This includes, in the four Welsh dioceses, inability to preach, administer the sacraments, perform other pastoral duties, and converse in Welsh, subject to an appeal to the archbishop; (1838) 1 & 2 Vict. c. 106, s. 104; Marquis of Abergavenny *v.* Bp. of Llandaff (1888) 20 Q. B. D. 460.

vicious conduct, heresy, or offences against ecclesiastical law in matters of ritual—anything, in short, which, if it occurred after admission, might be a ground for depriving him of the benefice.[1] And, under sect. 2 of that Act, the bishop may do so, (*a*) if at the date of the vacancy not more than a year has elapsed since a transfer within the purview of sect. 1 [2] of the right of patronage of the benefice, unless the transfer is proved not to have been effected in view of the probability of a vacancy within the year; or (*b*) if not more than three years have elapsed since the presentee was ordained deacon; or (*c*) if the presentee is unfit owing to physical or mental infirmity, serious pecuniary embarrassment, grave misconduct, or neglect of duty in an ecclesiastical office, evil life, or scandal caused by his moral conduct since ordination; or (*d*) if he has, with reference to the presentation, been knowingly party or privy to a transaction or agreement invalid under the Act.[2] The 39th Canon lays down that a bishop shall not institute to a benefice a clergyman who has been ordained by another bishop, without production of his letters of orders and a sufficient testimony of his former good life and behaviour if the bishop requires it,[3] and his appearing on

[1] Ayl. Par. 39-42; Heywood *v.* Bp. of Manchester (1884) 12 Q. B. D. 404.

[2] See § 2 above.

[3] The "sufficient testimony" consists, by long-established practice, of a testimonial by three beneficed clergymen,

due examination to be worthy of his ministry. What this examination covers is not clearly definable; but it has not such a wide scope as the examination contemplated in Canon 48, which does not apply to presentees to livings.[1] Under the 95th Canon a bishop is allowed twenty-eight days for inquiry as to the fitness of a presentee; but this is merely directory, and he is not precluded from continuing the inquiry after their expiration.[2]

4. If a bishop refuses to admit a presentee on a ground specified in sect. 2 of the Act of 1898, or on account of any other unfitness or disqualification sufficient in law, not having reference to doctrine or ritual, he is to signify in writing his refusal, and the ground for it, to the patron and the presentee; and either of them may within one month thereafter require that the matter be heard by a court consisting of the archbishop

countersigned by the bishops of their dioceses if they are not beneficed in the diocese of the bishop to whom the testimonial is given, that the presentee has been personally known to them for three years last past; that they have had opportunities of observing his conduct, and during the whole of that time they verily believe that he has lived piously, soberly, and honestly, and that they have not heard anything to the contrary thereof, nor that he has at any time held, written, or taught anything contrary to the doctrine or discipline of the Church, and that they believe him to be, as to his moral conduct, a person worthy to be admitted to the benefice.

[1] Bp. of Exeter *v.* Marshall (1868) L. R. 3 H. L. 17.

[2] Gorham *v.* Bp. of Exeter (1849) 2 Rob. Eccl. 1; 13 Jur. 238.

of the province (or if it was the archbishop who refused to admit, the archbishop of the other province) and a judge of the Supreme Court, nominated by the Lord Chancellor. The judge is to decide all questions of law and fact, and if the judge finds that there is no fact sufficient in law to constitute unfitness or disqualification, the archbishop is to direct the admission of the presentee. But if the judge finds that such fact does exist, the archbishop is to decide whether the presentee is actually in consequence unfit to serve the benefice, and adjudge whether admission ought under the circumstances to be refused. In either case his judgment is to be final.[1] When the bishop has refused to admit a presentee, the patron cannot present him again in respect of the same vacancy.[2] If the bishop refuses to admit the presentee of a clerical patron and the refusal is upheld by the court, the patron has the same right of further presentation as if he were a lay patron.[3] If a bishop refuses to admit a presentee on the ground of doctrine or ritual, the old alternative remedies remain, either (*a*) of a suit of *duplex querela* by the presentee in the ecclesiastical court of the province, or (*b*) of an action of *quare impedit* by the patron in the High Court of Justice.[4]

5. Before the bishop admits a clerk to a vacant

[1] (1898) 61 & 62 Vict. c. 48, s. 3.
[2] *Ib.* s. 6 (1).
[3] *Ib.* s. 6 (2).
[4] Ayl. Par. 233–5.

benefice, he must send to the churchwardens in a registered letter a formal notice of his intention so to do, with a statement of the ecclesiastical preferments which the clerk has held, and a direction that the notice is to be fixed for one month on the principal door or notice-board of the church; after which it is to be returned to the bishop with a certificate, signed by the churchwardens, that the direction has been complied with.[1] The object of this proceeding is to give to the parishioners the opportunity of communicating to the bishop the existence of any fact known to them which would constitute a valid and legal ground for the bishop to refuse the presentee.

6. The bishop admits a presentee by formal institution in the case of a rectory or vicarage (the presentee kneeling before him), and by licence in the case of a perpetual curacy. In the case of admission to the benefices of new ecclesiastical parishes, which though by law perpetual curacies, are titular vicarages,[2] the practice varies. Admission by licence is the correct course; but by the desire of the presentee himself institution is sometimes granted. Where the bishop is himself the patron, he cannot present, and therefore admits by collation, which corre-

[1] Benefices Act, 1898 (61 & 62 Vict. c. 48), s. 2 (2); Benefices Rules, 1898, ru. 11, 12, sch. form (7).

[2] (1868) 31 & 32 Vict. c. 117.

sponds to the two processes of presentation and institution.[1] Before institution, collation, or admission by licence, the clerk makes two declarations and takes two oaths.[2]

(i.) A declaration of assent, namely—

I assent to the Thirty-nine Articles of Religion, and to the Book of Common Prayer, and of the ordering of Bishops, Priests, and Deacons. I believe the Doctrine of the Church of England as therein set forth, to be agreeable to the Word of God; and in Public Prayer and Administration of the Sacraments I will use the Form in the said Book prescribed and none other, except so far as shall be ordered by lawful authority.[3]

(ii.) A declaration against simony, namely—

I, A. B., hereby solemnly and sincerely declare in reference to the presentation made of me to the rectory or vicarage, &c.) of as follows:

1. I have not received the presentation of the said rectory (or vicarage, &c.) in consideration of any sum of money, reward, gift, profit, or benefit directly or indirectly given or promised by me, or by any person to my knowledge or with my consent, to any person whatsoever; and I will not at any time hereafter perform or

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[1] Gibs. Cod. 813.

[2] 28 & 29 Vict. c. 122 (Clerical Subscription Act, 1865), ss. 1, 5, 12; 31 & 32 Vict. c. 72 (Promissory Oaths Act, 1868), ss. 2, 8, 9, 14; 61 & 62 Vict. c. 48 (Benefices Act, 1898), s. 1 (4) sch.

[3] This may be the authority of the King in Council, under which the names of the sovereign and members of the Royal Family are changed in the prayers for them (Gibs. Cod. 280), and other forms are from time to time prescribed; or that of the archbishop or bishop, so far as they have power in the matter. See below, ch. v. § 1.

satisfy any payment, contract, or promise made in respect of that presentation by any person without my knowledge or consent.

2. I have not entered, nor, to the best of my knowledge and belief, has any person entered, into any bond, covenant, or other assurance or engagement, otherwise than as allowed by sections one and two of the Clergy Resignation Bonds Act, 1828,[1] that I should at any time resign the said rectory (or vicarage, &c.).

3. I have not by myself, nor, to my knowledge, has any person on my behalf, for any sum of money, reward, gift, profit, or advantage, or for or by means of any promise, agreement, grant, bond, covenant, or other assurance of or for any sum of money, reward, gift, profit, or benefit whatsoever, directly or indirectly procured the now existing avoidance of the said rectory (or vicarage, &c.)

4. I have not, with respect to the said presentation, been party or privy to any agreement which is invalid under section one, subsection three, of the Benefices Act, 1898.[2]

(iii.) The oath of allegiance, namely—

I, A. B., do swear that I will be faithful and bear true allegiance to His Majesty King Edward the Seventh, His Heirs and Successors according to Law. So help me God.

(iv.) The oath of canonical obedience, namely—

I, A. B., do swear that I will perform true and canonical obedience to the Bishop of C. and his successors in all things lawful and honest. So help me God.[3]

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[1] See below, § 22. [2] See above, § 2 (*c*).

[3] Clarke Proxis, tit. xci.; Gibs. Cod. 810. This oath does not mean that the clerk will obey all the commands of the bishop against which there is no law, but that he will obey all such commands as the bishop by law is authorised to impose; Long *v.* Bp. of Capetown (1863) 1 Moo. P. C. N. S. 411, at p. 465.

Moreover, on the first Lord's Day on which he officiates in church in his benefice, or such other Lord's Day as the ordinary allows, he is to read publicly the Thirty-nine Articles, and make the declaration of assent, adding after "Articles of Religion," the words, "which I have now read before you."[1]

7. A clerk who has been admitted to a benefice by either institution, collation, or licence is thereby invested with the cure of souls of the parish, and with the right to the temporalities; and, in the case of admission by licence, nothing more is requisite to place him in full enjoyment of the benefice. But, in the case of institution or collation, the further process of induction is necessary to invest him with the actual possession of its temporalities. The bishop issues his mandate for the purpose to the archdeacon or some other person, who, in obedience thereto, goes to the church, and, placing the clerk's hand upon the key or ring of the door, inducts him into the real, actual, and corporal possession of the church, with all its rights, profits, and appurtenances.[2]

8. The following fees in connection with the admission to benefices were settled in June 1895, under the Acts 1 & 2 Vict. c. 106, and 30 & 31 Vict. c. 135:[3]—

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[1] (1865) 28 & 29 Vict. c. 122, s. 7.
[2] Johns. vol. i. p. 84; Wats. ch. xv. p. 155, sq.
[3] *London Gazette*, July 2, 1895.

	Vicar General or Chancellor.	Registrar or other Officer by usage performing the duty.	Secretary of Archbishop or Bishop.	During existing vested interests.		
				Apparitor.	Sealer.	Record Keeper.
	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.
Collation to a benefice . .	16 8	2 2 4	4 4 0	3 6	4 6	4 6
Institution to a benefice . .	16 8	2 2 4	4 4 0	3 6	4 6	2 6
Licence to a perpetual curacy .	9 4	1 15 8	2 2 0		1 0	1 0
	Archdeacon's Official.	Archdeacon's Registrar.				
	£ s. d.	£ s. d.				
Induction to a benefice (whether of one parish, or of two or more united parishes)	10 0	13 0		1 0	1 0	2 6

9. Admission to a benefice confers the right and imposes the duty of the cure (Lat. *cura*) or care of souls within the parish attached to the benefice. The nature of this duty can be gathered from the Form of Ordering of Priests, the rubrics and provisions of the Book of Common Prayer, and the Canons of 1603. Every clergyman, at the time of his ordination as priest, solemnly promises (*a*) so to minister the doctrine and sacraments and the discipline of Christ as the Lord has commanded, and as the Church and Realm of England have received the same, and to teach the people committed to his cure and charge with all diligence to keep and observe the same; (*b*) to be ready to banish and drive away all erroneous and strange doctrines contrary to God's Word, and to use both public and private exhortations, as well to the sick as to the whole, within his cure, as need requires and occasion is given; (*c*) to be diligent in prayers and in reading of the Holy Scriptures, and in such studies as help to the knowledge of the same, laying aside the study of the world and the flesh; (*d*) to frame and fashion himself and his family according to the doctrine of Christ, and to make both himself and them wholesome examples and patterns to the flock of Christ; (*e*) to maintain and set forward quietness, peace, and love among all Christian people, and especially among those committed to his charge; and (*f*) reverently to obey his ordi-

nary and other chief ministers, following with a glad mind and will their godly admonitions, and submitting himself to their godly judgments. While the cure of souls thus embraces the general care of the spiritual and moral welfare of the people, it includes the following particulars, which will be separately considered: (i.) Residence; (ii.) Performance of Divine Service, including the Administration of the Sacraments, Preaching and Catechising; (iii.) Solemnisation of Marriage; (iv.) Burial of the Dead; and (v.) Private Ministrations, including the Visitation of the Sick.

10. Speaking generally, and with the exceptions and under the restrictions to be presently mentioned, the incumbent and clergymen permitted by him have the sole right of ministering within his parish; and a clergyman who intrudes and performs any clerical function in it without his permission, commits an ecclesiastical offence.[1] But the bishop, as the chief pastor, has the right to officiate in any church and parish within his diocese whenever he pleases. And an incumbent cannot authorise another clergyman to officiate in his church or parish without the licence of the bishop; but this rule has been held not applicable in its absolute strictness to

[1] Duke of Portland *v.* Bingham (1792) 1 Hag. Cons. 157, 161; Carr *v.* Marsh (1814) 2 Phill. 198, 206; Farnworth *v.* Bp. of Chester (1825) 4 B. & C. 555, 568; Bliss *v.* Woods (1831) 3 Hag. Eccl. 486, 501–512; Nesbitt *v.* Wallace (1901) P. 354.

merely occasional and isolated acts of ministration.[1] The few cases in which two or more incumbents have had the cure of souls within the same parish, have been dealt with by recent legislation.[2] The 28th and 57th Canons prohibited the practice of persons leaving their own parish church and communicating or causing their children to be baptized elsewhere. But this prohibition is not now in force ; and by a general understanding and comity, especially in towns subdivided into several ecclesiastical parishes, not only do Church people frequent at will the particular church which they prefer, but the incumbent of that church pays spiritual visits in sickness and at other times to regular members of his congregation who reside in another parish.

11. The ministrations of the incumbent himself are restricted by Canon 71, under which, except where a person is prevented from going to church by infirmity or sickness, no minister may preach or administer the Holy Communion in any private house in which there is not a chapel dedicated and allowed by the ecclesiastical law of the realm, nor, where there is such a chapel, in any other place but the chapel, and even there only seldom on Sundays and holy-days in order that the lord or master of the house and his family may at other

[1] Canon 48 ; Yates *v.* Chambers (1824) 2 Add. 177, 191.

[2] (1839) 2 & 3 Vict. c. 30 ; (1840) 3 & 4 Vict. c. 113, s. 72 ; (1869) 32 & 33 Vict. c. 94, s. 4.

times resort to their own parish church and there receive the Holy Communion at least once every year. An incumbent can perform Divine service in any consecrated building in his parish without a licence from the bishop; but, strictly speaking, he requires the bishop's licence to authorise him to do so in any unconsecrated building, whether within or outside his parish, or anywhere in another diocese; and a bishop can inhibit an incumbent of his diocese from officiating within the diocese elsewhere than in the consecrated buildings within his own parish. If an incumbent transgresses in any of these respects he is liable to be sued for an ecclesiastical offence.[1] Moreover, strangely enough, the Acts which legalised the worship of Dissenters not only withdrew them from the care of the incumbent of the parish but also restricted his action among Church people. For these Acts prohibited any meeting for Protestant religious worship of more than twenty persons, besides the family and servants of the house where it was held, except at a place duly certified for the purpose.[2] But in 1855 it was enacted that these prohibitions should not apply to any assembly for religious worship either (*a*) conducted by the incumbent or curate in charge of the parish or any

[1] Cripps, 580; Moysey *v.* Hillcoat (1828) 2 Hag. Eccl. 30, 46; Bp. of Down *v.* Miller (1861) 11 Ir. Ch. Rep. App. i., ix.; 5 L. T. N. S. 30; Kitson *v.* Drury (1865) 11 Jur. N. S. 272.

[2] (1688) 1 Will. & Mar. sess. 1, c. 18; (1812) 52 Geo. 3, c. 155.

person authorised by him, or (*b*) meeting in private premises, or (*c*) meeting occasionally in a building not usually appropriated to religious worship.[1]

12. There are also special cases in which the right of an incumbent to officiate and exercise the cure of souls is actually superseded in favour of a chaplain appointed without his consent. Where a nobleman has a chapel within or attached to his residence he has the right to appoint a chaplain to serve it.[2] The chapels of public and endowed schools under the Acts of 1868 and 1869 are free from the jurisdiction and control of the incumbent of the parish in which they are situate.[3] Moreover, a bishop may license a clergyman to administer the Lord's Supper and perform services other than the solemnisation of marriage, and, subject to the direction of the ordinary, to dispose of the offertory and collections, in the chapel of any college, school, hospital, asylum, or public or charitable institution within his diocese; and where this is done, the institution and chapel are withdrawn from the cure of souls and control of the incumbent of the parish.[4] During the eighteenth and first part of the nineteenth century, before the Church Building and New Parishes Acts had afforded facilities for creating new parishes, unconsecrated proprietary chapels

[1] 18 & 19 Vict. c. 86 (Liberty of Religious Worship Act).
[2] Degge, 188 (pt. i. ch. 12).
[3] 31 & 32 Vict. c. 118, s. 31; 32 & 33 Vict. c. 56, s. 53.
[4] 34 & 35 Vict. c. 66 (Private Chapels Act, 1871).

were built in various places, with the consent of the bishop of the diocese and incumbent of the parish, to meet the wants of overgrown town populations. These chapels can only be served by ministers acting under the licence of the bishop, (which he can at any time revoke),[1] and with the consent of the incumbent, which, though he cannot himself revoke it, is not binding on his successors.[2] Unless the incumbent waives the right to the alms collected in the chapel, they must be accounted for to him. The chapel is private property, and no one can claim to attend it as of right.[3]

13. The right to the cure of souls in a parish naturally carries with it the right of the incumbent to a voice in the erection of a new church in the parish and the severance of any portion of the parish from his benefice and its formation into a new ecclesiastical district or parish. The various modes in which these objects may be effected are mentioned in the note to Ch. I. § 6 above. The enactments on the subject provide opportunities for the incumbents of the existing parishes, which would be affected by any contemplated action in the matter, to lay their views and objections, if any, before the bishop and the Ecclesiastical Commissioners; but their views need not necessarily be accepted and their objections may be overruled.

[1] Hodgson *v.* Dillon (1840) 2 Curt. 388.
[2] Richards *v.* Fincher (1874) L. R. 4 A. & E. 255.
[3] Bosanquet *v.* Heath (1860) 9 W. R. 35; 3 L. T. N. S. 290.

14. An incumbent cannot hold more than one benefice at the same time, except that upon a certificate of the bishop as to the facts, and with a licence or dispensation from the archbishop of the province (from the refusal of which there is an appeal to the King in Council), he may hold a second, the church of which is within four miles of that of the first by the nearest road, if the annual value of one of the benefices does not exceed the net sum of £200, after deducting rates, taxes, tenths, dues, and permanent charges, but not the stipend of a curate. But where the population of one of the parishes is over 3000, the joint holding will only be lawful if that of the other is under 500.[1]

15. The bishop is invested with certain specific powers in case of the inadequate performance of the ecclesiastical duties of a benefice, including not only the regular and due performance of Divine service on Sundays and holy days at the usual hours, but also all such duties as the incumbent is bound by law to perform, or the performance of which was solemnly promised by him at his ordination,[2] and the performance of which has been required of him in writing by the bishop; and including also, in the four Welsh dioceses and the county of Monmouth, such ministrations in Welsh as the

[1] (1838) 1 & 2 Vict. c. 106, ss. 4, 6, 7, 9, 10; (1850) 13 & 14 Vict. c. 98, ss. 1–4; (1885) 48 & 49 Vict. c. 54, s. 14.

[2] See § 9 above.

bishop directs to be performed by him, not being more than one service in Welsh on every Sunday in any church, and without interfering with due provision for the English-speaking portion of the people. If the bishop has reason to believe that these duties are inadequately performed by an incumbent, he may issue a commission of inquiry to four commissioners, viz. the archdeacon or rural dean of the archdeaconry or deanery in which the benefice is situate; the canon residentiary, prebendary, or honorary canon of the cathedral church of the diocese elected triennially for the purpose by the dean and chapter; the beneficed clergyman elected triennially for the purpose by and out of the beneficed clergy of the archdeaconry; and a lay justice of the peace of the county nominated on the requisition of the bishop by the chairman of quarter sessions or lord-lieutenant of the county; and the incumbent may, if he desires, add a beneficed clergyman of the diocese or a justice of the peace as a fifth commissioner. If the commissioners or a majority of them report that the duties are inadequately performed, the procedure may be different, according as they do or do not add that this is due to the negligence of the incumbent. If they do not report negligence, the bishop has only power to require the incumbent to nominate one or more curates to perform or assist in performing the duties, and to make the appointment himself if

the incumbent fails to do so, subject to an appeal to the archbishop.[1] But if they report negligence, the bishop may make the appointment without previously requiring the incumbent to nominate, and may inhibit the incumbent from performing all or any of the duties, subject to an appeal by him to the tribunal constituted by the Benefices Act, 1898.[2] Evidence given before the commissioners is privileged.[3]

16. An incumbent is ordinarily bound to reside in his benefice, or in one of them if he holds two, or in the parsonage or vicarage house (if any);[4] and, even though he keeps a curate, it is his duty, unless excused for some valid reason by the bishop, to read the prayers and administer the sacraments at least once a month.[5] If he is absent in any year more than 90 days altogether, he is liable to forfeit, by way of penalty, one-third; if more than 180 days, one-half; if more than 240 days, two-thirds; and, if for the whole time, three-fourths of the year's income of the benefice; unless he has the bishop's licence, or if the bishop has refused it, the archbishop's licence, for non-residence.[6] This licence may be granted on

[1] (1838) 1 & 2 Vict. c. 106, ss. 77, 85–87, 105; (1885) 48 & 49 Vict. c. 54, ss. 1–8.

[2] 61 & 62 Vict. c. 48, s. 9.

[3] Barratt *v.* Kearns (1905) 1 K. B. 504.

[4] Gibs. Cod. 885; (1838) 1 & 2 Vict. c. 106, ss. 32, 34, 35; Bluck *v.* Rackham (1845–6) 1 Rob. Eccl. 367; 5 Moo. P. C. 305; 4 Not. of Ca. 85, 534; 9 Jur. 497; 11 *Ib.* 325; 9 Q. B. 691.

[5] (1662) 14 Cha. 2. c. 4 (Act of Uniformity) s. 5.

[6] (1838) 1 & 2 Vict. c. 106, ss. 32, 42, 114–121.

account of (i.) mental or physical infirmity; (ii.) the dangerous illness of the incumbent's wife or child residing with him (but in that case for six months only, renewable from time to time by leave of the archbishop on the recommendation of the bishop); (iii.) the absence or unfitness of a house of residence; (iv.) the occupation by the incumbent of a house of his own in the parish, provided he keeps the house of residence in good repair.[1] Exceptions are made in favour of incumbents holding certain official positions;[2] and the bishop, with the sanction of the archbishop, may grant a licence to reside outside the benefice, where he thinks it expedient so to do. A licence for non-residence is only valid until the 31st of December in the year next after that in which it was granted; and it may at any time be revoked, subject, in the case of a bishop's licence, to an appeal to the archbishop.[3]

17. In lieu of or after proceeding for pecuniary penalties, the bishop may issue a monition and order requiring a non-resident incumbent to reside on and perform the duties of his benefice, and in case of non-compliance with the order may, subject to an appeal to the archbishop, sequester the revenues of the benefice until residence is resumed, and direct their application in payment of the penalties, the expenses of the monition and sequestration, the repair and

[1] (1838) 1 & 2 Vict. c. 106, ss. 33, 41–51, 57.
[2] *Ib.* ss. 37–39.
[3] *Ib.* ss. 46, 49.

upkeep of the chancel, house of residence, and other property of the benefice, the satisfaction of any creditor's sequestration, and the augmentation or improvement of the benefice or its property, allowing, if he pleases, a certain proportion to the incumbent.[1] If a benefice continues for a year under sequestration for non-residence or an incumbent incurs two sequestrations for non-residence within two years, and is not relieved in respect of either on appeal, it becomes void as if the incumbent were dead.[2]

18. The law also makes provision for the performance of the ecclesiastical duties of a benefice by curates in the case of an incumbent who does not reside thereon for nine months in each year and does not with the consent of the bishop perform the ecclesiastical duties while residing on another benefice of which he is the incumbent, or while holding a licence not to reside on the benefice or not to reside in the parsonage house thereof.[3]

19. Incumbents who are non-resident with the bishop's licence cannot without the bishop's permission resume the duties of their benefice before the expiration of their licence; nor can they, if non-resident for more than twelve months, interfere during that period with the curate entrusted with those duties by the bishop.[4]

[1] (1838) 1 & 2 Vict. c. 106, ss. 54–58.
[2] *Ib.* ss. 108, 112, 113. [3] See below, ch. iii. §. 2 (*c*).
[4] (1885) 48 & 49 Vict. c. 54, s. 12.

20. In reckoning the periods prescribed by law as to non-residence, a month is a calendar month, except where it is to be made up of an aggregate of lesser periods, in which case thirty days are to be deemed a month. A year is to be reckoned as commencing on January 1, and ending on the following December 31, both inclusive.[1]

21. An incumbent vacates his benefice by (i.) death, (ii.) resignation, (iii.) admission to other preferment which he cannot by law hold therewith, or (iv.) deprivation.

22. Resignation must be tendered to the bishop, and unless made in view of an exchange must be unconditional. It should be made either in person or by a deed attested by two witnesses. The presence and attestation of a notary in addition are usual but are not essential. The resignation may be made at the request of the bishop to avoid scandal and legal proceedings, and he may agree to postpone the declaration of the vacancy to a fixed date in the future in order to enable the incumbent to receive the tithe rent-charge accruing before that date. Its acceptance by the bishop need not be signified in any particular form or even in writing, and is implied if the resignation was tendered at the bishop's request. It cannot be revoked after its acceptance by the bishop. Whether it can, under any circumstances,

[1] (1838) 1 & 2 Vict. c. 106, ss. 120, 121.

be revoked previously to acceptance by him is not clear.[1] If, however, it is made for the purpose of an exchange, it does not take effect unless the exchange is carried out; so that if either of the exchanging incumbents dies before being inducted to his new living, both resignations are void, as well as the institution and induction of the other to the deceased's old living, if that has taken place.[2] The Benefices Act, 1898, precludes an incumbent, when he is presented, from entering into any engagement for resigning the benefice except under the Clergy Resignation Bonds Act, 1828, sects. 1, 2, which allow such an engagement with a view to the appointment to the benefice, when resigned, of a single specified individual whomsoever, or of one of two specified individuals, each of whom is by blood or marriage an uncle, son, grandson, brother, nephew, or great-nephew of the person or one of the persons entitled in equity to the patronage of the benefice, or of a married woman whose husband is in her right the patron or one of the patrons.[3] The corrupt taking of any pension money or other benefit for the resignation or exchange of a benefice is prohibited by 31 Eliz. c. 6, s. 7. But under

[1] Reichel *v.* Bp. of Oxford (1887) 35 Ch. D. 48; aff. (1889) 14 App. Ca. 259; comp. *Ib.* 665.

[2] Gibs. Cod. 821; Wats. ch. iv. p. 28; Colt *v.* Bp. of Coventry and Lichfield (1612) Hob. 140, 152.

[3] 9 Geo. 4, c 94; 61 & 62 Vict. c. 48, s. 1 (4), sch.

the Incumbents Resignation Acts, 1871 and 1887, a pension may be awarded out of the revenue of the benefice to an incumbent who, after a continuous holding of the benefice for not less than seven years, retires therefrom on the ground of incapacity to perform the duties by reason of permanent mental or bodily infirmity. The bishop, if he thinks fit, on the representation of the incumbent, appoints a commission to inquire and report as to the expediency of the resignation, and, if the majority of the commissioners consider it expedient, as to the amount of the pension ; which must not exceed one-third of the net annual value of the benefice, exclusive of the house of residence. If the patron refuses consent to the resignation, the question of its acceptance is to be decided by the archbishop. If the incumbent is a lunatic, found such by inquisition or certificate of a master of lunacy, the resignation may be carried out in his name by the committee of his estate; but no provision exists for effecting the resignation of an incumbent of unsound mind, not so found. If any part of the income of the benefice is derived from tithe rentcharge or glebe lands, the pension is to vary like the tithe rentcharge with the corn averages; but it will not otherwise be affected by a change in the value of the benefice.[1] It

[1] Robinson *v.* Dand (1886) 17 Q. B. D. 341.

will cease if the pensioner relinquishes the rights and privileges of holy orders under the Clerical Disabilities Act, 1870, or is admitted to another benefice; and if he undertakes clerical duties for a remuneration elsewhere than in the benefice which he resigned, the bishop may decide that his pension shall cease or be diminished altogether or for a limited time; and the archbishop, on appeal, may confirm, annul, or vary the bishop's decision.[1] A sum due from the retiring incumbent to his successor for dilapidations may be deducted out of the pension, so that the deduction do not without the bishop's consent exceed in any year one-half of the pension; but no other debt can be set off against it.[2]

23. Except in the case already mentioned of an incompleted exchange,[3] an incumbent *ipso facto* vacates his benefice on admission to another preferment which cannot at law be held with it.[4]

24. Deprivation is either (*a*) by operation of law or (*b*) by sentence. (*a*) It takes place *ipso facto* (i.) if the presentation or admission to the benefice has been simoniacal, or if a person who has been corruptly ordained is admitted to the benefice within seven years afterwards;[5] (ii.) if the

[1] (1871) 34 & 35 Vict. c. 44; (1887) 50 & 51 Vict. c. 23; Maning v. Hardy (1904) 20 Times Law Rep. 776.

[2] Gathercole *v.* Smith (1881) 17 Ch. D. 1; 7 Q. B. D. 626; (1887) 50 & 51 Vict. c. 23. s. 6.

[3] § 22 above.

[4] (1838) 1 & 2 Vict. c. 106, s. 11; (1850) 13 & 14 Vict. c. 98, s. 7.

[5] (1589) 31 Eliz. c. 6, ss. 4–6, 9.

incumbent is convicted a third time of a breach of the provisions of the Acts of Uniformity as to using the Book of Common Prayer and no other, and as to not preaching in derogation thereof;[1] (iii.) if the incumbent wilfully omits to read publicly the Thirty-nine Articles and his declaration of assent after his admission to the benefice;[2] (iv.) if the benefice continues a whole year under sequestration for disobedience to the bishop's monition or order requiring the incumbent to reside on the benefice, or if he incurs two such sequestrations within two years, and is not relieved as to either of them on appeal;[3] (v.) if an inhibition for enforcing obedience by the incumbent to a monition or order under the Public Worship Regulation Act, 1874, remains in force for more than three years, or a second inhibition for the same purpose is issued within three years from the relaxation of a former inhibition, and the bishop does not intervene;[4] or (vi.) in the case of an incumbent presented or collated since 1898, if within a year after his admission his benefice is sequestrated on his bankruptcy or in aid of an execution against his property, or if such a sequestration, issued after that period, continues for a year, or if he incurs two such sequestrations within

[1] (1559) 1 Eliz. c. 2, s. 2; (1662) 14 Cha. 2, c. 4, s. 20.
[2] (1662) 14 Cha. 2, c. 4, ss. 2, 38; (1865) 28 & 29 Vict. c. 122, s. 7. See § 6 above.
[3] (1838) 1 & 2 Vict. c. 106, ss. 58, 120.
[4] 37 & 38 Vict. c. 85, s. 13.

two years, unless the bishop otherwise directs.[1] Moreover (vii.) the bishop is to declare a benefice vacant if the incumbent is convicted of treason or felony or, on indictment, of a misdemeanour, and is sentenced to imprisonment with hard labour or any greater punishment, or he has a bastardy order made against him, or in a divorce or matrimonial cause he is either found to have committed adultery or an order for judicial separation is made against him; but if, after being so convicted, he receives a free pardon from the Crown before the benefice is filled up, he is to be reinstated in it.[2] (*b*) Sentence of deprivation is pronounced in suitable cases in proceedings against an incumbent for a serious offence against morality under the Clergy Discipline Act, 1892, or for an offence in respect of doctrine or ritual or other matter of ecclesiastical cognisance under the Church Discipline Act, 1840.[3]

[1] 61 & 62 Vict. c. 48 (Benefices Act, 1898), s. 10.

[2] (1870) 33 & 34 Vict. c. 23, s. 2; (1892) 55 & 56 Vict. c. 32 (Clergy Discipline), s. 1.

[3] 3 & 4 Vict. c. 86; 55 & 56 Vict. c. 32.

CHAPTER III

UNBENEFICED CLERGY

1. The unbeneficed clergy engaged in parochial work may be divided into (i.) curates or ministers in charge; (ii.) assistant licensed curates; (iii.) unlicensed assistants; and (iv.) lecturers or preachers. An unbeneficed clergyman has no recognised legal status unless he obtains a licence from the bishop of the diocese, for which the fee is 10s.[1] At the time of being licensed (unless, having been ordained the same day, he has already done so) he must make and subscribe the Declaration of Assent prescribed by the Clerical Subscription Act, 1865; and on the first Lord's Day on which he officiates in the parish to which he is licensed he must publicly repeat the same declaration in the presence of the congregation during Divine service.[2] Canon 48 requires that before a curate or minister is permitted to serve in any place he must be examined and admitted by the bishop, having respect to the greatness

[1] (1838) 1 & 2 Vict. c. 106, s. 82. For the stamp duty on licences, and exemptions therefrom, see (1891) 54 & 55 Vict. c. 39, sch. "Licence."

[2] 28 & 29 Vict. c. 122, ss. 1, 8; see ch. ii. § 6 (i.).

of the cure and the meetness of the party. Nor, if he removes from one diocese to another, is he to be admitted to serve without the testimony of the bishop of that from which he came, as to his honesty, ability, and conformity to the ecclesiastical laws of the Church of England. But this Canon gave no absolute right to stipendiary curates to be admitted to serve after examination and upon good episcopal testimony. They might, notwithstanding, "be placed and displaced at the bishop's discretion without any process at law." He is under no obligation to grant a licence to a curate, and cannot be compelled to do so.[1] It is now, however, enacted, with respect to the removal of curates, that the bishop, after giving him sufficient opportunity of showing reason to the contrary, may summarily revoke the licence granted to any curate and remove him for any cause which appears good and reasonable to the bishop. But the curate may within one month after service upon him of the revocation appeal to the archbishop of the province, who may confirm or annul the revocation as he thinks proper.[2]

2. Curates or ministers in charge are appointed in a variety of cases. (*a*) If a benefice is vacant, the sequestration of it is granted by the bishop to

[1] Johns. vol. i. p. 95; see Ex parte Carlyon (1903) *Times*, Dec. 19; s.c. nom. R. *v.* Bp. of Liverpool (1904) *Times*, May 4.

[2] (1838) 1 & 2 Vict. c. 106, s. 98; Poole *v.* Bp. of London (1859) 5 Jur. N. S. 522; (1861) 14 Moo. P. C. 262; 7 Jur. N. S. 347.

the churchwardens or some one or more other persons; and subject to the direction of the bishop, if he gives any, the sequestrators are charged with the selection of the person or persons to serve the cure during the vacancy, and the bishop may assign to him or them a stipend not greater in the case of each than at the rate of £200 per annum, and so that the aggregate amount assigned do not exceed the net annual income of the benefice. The sequestrators pay the costs of serving the cure out of the revenue of the benefice, and account for the balance to the succeeding incumbent, upon whom on the other hand any deficiency falls if these costs exceed the net revenue received by the sequestrators.[1] (*b*) Where under the bankruptcy of the incumbent, or under a judgment recovered against him, a benefice remains under sequestration for six months, the bishop from the expiration of the six months till the close of the sequestration is to take order for the services in the church of the benefice, and may appoint and license for the purpose one or more curates or additional curates to reside in and serve the parish, subject to revocation at any time, and with such stipends out of the revenue of the benefice as he thinks fit within certain pre-

[1] (1536) 28 Hen. 8, c. 11; (1838) 1 & 2 Vict. c. 106, ss. 99–101; Dakins *v.* Seaman (1842) 9 M. & W. 777; (1885) 48 & 49 Vict. c. 54, s. 10.

scribed limits according to the population of the parish, and not exceeding in the whole two-thirds of the annual value of the benefice.[1] (*c*) Where an incumbent is absent from his benefice for a period or periods exceeding altogether three months in any one calendar year, he must leave a curate or curates licensed or approved by the bishop to perform the ecclesiastical duties of the benefice. If he fails to do so, or if after the death, resignation, or removal of any such curate he does not within one month notify the fact to the bishop, or does not within four months nominate another proper curate to the bishop, the bishop may appoint and license a proper curate, with directions as to residence and with a stipend according to a prescribed scale, varying with the value of the benefice and the population of the parish and the grounds of the non-residence of the incumbent. A curate who is appointed to serve in a benefice on which the incumbent does not reside during four months in the year is to be required by the bishop to reside within the parish, or within three miles of the church of the benefice, if no convenient residence can be procured within the parish, except in cases of necessity approved by the bishop. If the population of the benefice exceeds 2000, the bishop may require the incumbent to nominate two or more curates, and, if this is not done, may himself appoint them. A scale of curates'

[1] 34 & 35 Vict. c. 45 (Sequestration Act, 1871).

stipends where the incumbent is non-resident is provided by law, varying according to the annual value of the benefice and other circumstances, and the bishop may direct that the curate shall reside in the parsonage house.[1] (*d*) Where a commission appointed to inquire into the matter has reported that the ecclesiastical duties of a benefice are inadequately performed owing to the negligence of the incumbent, the bishop may either require the incumbent to nominate a curate or curates with sufficient stipend to be licensed to perform or assist in performing the duties, or may himself appoint a curate or curates to perform all or any of the duties, subject to an appeal to the court constituted under the Benefices Act, 1898.[2] A minister in charge has the rights and powers of an incumbent in certain particulars, such as the choice of a churchwarden, and, if the benefice is vacant, but not if the incumbent is bankrupt, the appointment of the parish clerk.[3] (*e*) Where under the New Parishes Act, 1843, what is called a Peel district is constituted, and a minister is licensed to it by the bishop, he

[1] Canon 47; (1838) 1 & 2 Vict. c. 106, ss. 75, 76, 81–98, 120–122, 130; (1885) 48 & 49 Vict. c. 54, s. 9.

[2] See ch. ii. § 15; (1838) 1 & 2 Vict. c. 106, ss. 77, 85–87, 105; (1885) 48 & 49 Vict. c. 54, ss. 1–3; (1898) 61 & 62 Vict. c. 48, s. 9.

[3] Hubbard *v.* Penrice (1746) 2 Str. 1245; Reg. *v.* Allen (1872) L. R. 8 Q. B. 69; Pinder *v.* Barr (1854) 4 E. & B. 105; Lawrence *v.* Edwards (1891) 1 Ch. 144; 2 Ch. 72.

occupies a somewhat ambiguous position during the interval before it becomes a separate ecclesiastical parish upon the consecration of a church within its area. He is in many respects in the position of a perpetual curate, being a corporation sole, subject to the jurisdiction of the bishop and archdeacon, and independent of the incumbent of the parish so far as his licence extends. But he has no power to take marriages or burials, and the inhabitants of the district retain their ecclesiastical position as parishioners of the parish out of which the district is formed.[1]

3. Assistant unbeneficed clergy are contemplated by the canons, in which they are styled curates; and with the licence of the bishop any incumbent may employ one or more curates to assist him in serving the parish. A curate frequently comes in the first instance on probation without being licensed, and his tenure of office is then entirely dependent on the will of the incumbent.[2] But after he is licensed it becomes more secure; and, in the meantime, if a difficulty occurred about the remuneration for his services, the law would give it to him upon a *quantum meruit*. In order to obtain a licence, the curate must present to the bishop a declaration by the incumbent undertaking to

[1] 6 & 7 Vict. c. 37, ss. 11–14.
[2] Martyn *v.* Hind (1776) 2 Cowp. 437, 440.

pay to him a specified annual sum as his stipend and a declaration of his own intention to receive the whole of that stipend; and the licence will specify the amount of the stipend.[1] Any dispute between an incumbent and a curate respecting the curate's stipend is to be decided by the bishop, who may enforce payment of it by monition and sequestration of the benefice.[2] If the benefice becomes vacant, a curate must quit upon six weeks' notice from the new incumbent, if given within six months from the date of admission to the benefice. But in other cases, unless the bishop revokes his licence (see § 1 above), a curate can only be required to quit after six months' notice given by the incumbent with the previous written permission of the bishop, or of the archbishop, if the bishop refuses it and the archbishop grants it upon an appeal to him within one month after the bishop's refusal. On the other hand, unless he obtains the express written consent of the bishop, a curate before relinquishing a curacy to which he has been licensed must give three months' notice of his intention to the incumbent and the bishop, upon pain of forfeiting to the incumbent, as a debt retainable out of his stipend or recoverable at law, such sum not exceeding half a year's stipend as the bishop may

[1] (1865) 28 & 29 Vict. c. 122, ss. 3, 6.
[2] (1838) 1 & 2 Vict. c. 106, s. 83.

in writing direct.[1] Ordinarily, an incumbent who is himself resident and performing the duties of his cure has complete discretion whether he will employ any, and, if so, how many curates, and what duties shall from time to time be performed by any whom he employs. But, besides the cases of the incumbent's non-residence and negligence in the performance of duties noticed above (§ 2 (*c*), (*d*)), the bishop has power, if a commission issued by him reports that the duties of a benefice are inadequately performed, to require the incumbent, although himself engaged in performing them, to nominate an assistant curate or curates; and, if he fails to do so within three months, the bishop may himself appoint one or more, as the case may require, with a stipend proportionate to the value of the benefice and the population of the parish. The incumbent has an appeal to the archbishop, who may confirm or amend the bishop's action.[2] Moreover, where the annual value of a benefice exceeds £500, and either the population amounts to 3000, or there is a second church or chapel with a hamlet containing 400 persons, the bishop may require the incumbent to nominate an assistant curate, and, on his failing to do so

[1] (1838) 1 & 2 Vict. c. 106, ss. 95, 97. The notices require no special formalities; Tanner *v.* Scrivener (1888) 13 P. D. 128.

[2] (1838) 1 & 2 Vict. c. 106, s. 77; (1885) 48 & 49 Vict. c. 54, ss. 2–8.

within three months, may himself appoint one with a stipend not exceeding £150; subject to a similar appeal to the archbishop as in the case where the duties have been inadequately performed.[1]

4. An incumbent has an absolute discretion as to permitting or refusing any other clergyman, not being licensed as a curate to the parish, to officiate within his parish, with this qualification, that he has no right to permit any clergyman to officiate in his parish who by law is debarred from taking duty in the diocese. With regard to this, no unbeneficed clergyman has, strictly speaking, a right to officiate publicly in a diocese, either in church or elsewhere, without the licence or consent of the bishop, and his doing so is an ecclesiastical offence.[2] But if the bishop has not actually inhibited him from officiating, a clergyman may take merely temporary duty without obtaining the formal licence of the bishop.[3] If, without being either beneficed or licensed to a curacy in the diocese, he frequently takes duty therein, he should obtain a general licence from the bishop for the purpose. Canons 50 and 52 direct incumbents and churchwardens not to suffer any one to preach

[1] (1885) 48 & 49 Vict. c. 54, s. 13.

[2] Trebec *v.* Keith (1742) 2 Atk. 498; Barnes *v.* Shore (1846) 1 Rob. Eccl. 382; Freeland *v.* Neale (1848) *Ib.* 643. As to beneficed clergy, see above, ch. ii. § 11.

[3] Gates *v.* Chambers (1824) 2 Add. 177.

in their churches without showing his licence to preach, and require the names of strangers who preach with the date of their preaching and the name of the bishop by whom they were licensed, to be entered in a book for the information of the bishop of the diocese.

5. In some parishes provision has been made for the election or appointment of lecturers or preachers for the sole purpose of delivering lectures or preaching sermons. In any such parish the bishop, if he thinks fit, with the assent of the incumbent, may require the lecturer or preacher to perform other ministerial duties as assistant curate or otherwise, and may vary the duties from time to time. If the duties so prescribed are not performed, the defaulter may be removed from his office.[1]

[1] 7 & 8 Vict. c. 59 (Lecturers and Parish Clerks Act, 1844), ss. 1, 6.

CHAPTER IV

LAITY OF THE PARISH

1. THERE is no general law as to the relations between an incumbent and the lay officers of a parish. They vary in ancient and in new ecclesiastical parishes, and in particular places are modified by custom.

2. The vestry in an ancient parish consists of the ratepayers who are inhabitants of the parish or who, though not residents therein, are rated for the relief of the poor in respect of the parish, and of occupiers of hereditaments so rated. A meeting of the vestry is called by the incumbent and churchwardens by a notice in print or writing, and signed by the incumbent or a churchwarden or overseer, and affixed on or near the doors of all the churches and chapels in the parish in which the service of the Church is performed, on some Sunday at least three clear days before the meeting is to be held.[1] The

[1] (1818) 58 Geo. 3, c. 69; (1837) 7 Will. 4 & 1 Vict. c. 45; (1869) 32 & 33 Vict. c. 41, ss. 7, 19; Dawe *v.* Williams (1824) 2 Add. 130, 139; Ormerod *v.* Chadwick (1847) 16 M. & W. 367; 16 L. J. M. C. 143; Burnley *v.* Methley Overseers (1859) 1 El. & El. 789; Rand *v.* Green (1860), 6 Jur. N. S. 303; 9 C. B. N. S. 470; 30 L. J. C. P. 80.

incumbent is *ex officio* chairman of every vestry meeting. In case of his absence, or of there being no incumbent, the members of the vestry present elect one of themselves as chairman. In case of an equality of votes the chairman, as such, has a casting vote in addition to his previous right to vote as a member of the vestry.[1] In the event of a poll being demanded, it is taken by open voting, and the members of the vestry have from one to six votes, according to the amount of their assessment, those assessed at an annual value of under £50 having one vote, and those assessed at £50 and upwards having one vote for every complete £25 of their assessment up to £150; all at or above that figure having six votes and no more. In a new ecclesiastical parish or district a meeting in the nature of a vestry is composed of the same persons as would, if the parish or district were an ancient parish, be entitled to vote in the vestry thereof. But the Vestries Act, 1818,[2] only applies to ancient parishes. Consequently there is no plural voting in the quasi-vestry of a new parish, nor need the notice summoning a vestry meeting be given on a Sunday three clear days before the meeting.[3] But in

[1] (1818) 58 Geo. 3, c. 69, s. 2; Wilson *v.* M'Math (1819) 3 Phill. 67; 2 B. & Ald. 241; Reg. *v.* D'Oyly (1840) 12 A. & E. 139; 4 Jur. 1056; R. *v.* Bp. of Salisbury (1901) 1 K. B. 573, 579, aff. 2 K. B. 225.

[2] 58 Geo. 3, c. 69 (commonly called Sturges Bourne's Act).

[3] Reg. *v.* Barrow (1869) L. R. 4 Q. B. 577.

other respects a vestry or a meeting in the nature of a vestry in a new parish is regulated by the same procedure as in an ancient parish. Since the abolition of compulsory church rates in 1868, and the transfer of their secular duties to other bodies, the functions of these vestries or meetings, whether in old or in new parishes, have been for the most part confined to the election of churchwardens and the approval, or the contrary, of applications for faculties.[1] In some places under a local Act or by the adoption of the Vestries Act, 1831,[2] the functions of the vestry are exercised by a select vestry consisting of a limited number of householders elected by the parishioners.

3. With regard to churchwardens, the general law as to their appointment in ancient parishes is declared by the 89th and 90th Canons. They are to be chosen, if possible, by the joint consent of the minister and parishioners. But if these cannot agree upon the choice, the minister is to choose one and the parishioners another. A stipendiary curate being at the time in charge of the cure stands in the place of the incumbent in the choice of churchwardens.[3] The election is to be annual, in Easter week ; but the same persons are re-eligible for any number of years. By custom, however, there may be only one church-

[1] See § 3, and ch. v. § 5 (A), ix. § 4. [2] 1 & 2 Will. 4, c. 60.
[3] Hubbard *v.* Penrice (1746) 2 Str. 1245.

warden or more than two; and, as is the case in the City of London, both may by custom be elected by the parishioners, or by the lord of the manor, or one by the incumbent and the other by the outgoing churchwardens. The election ordinarily takes place at the Easter vestry, but an election at another time is valid.[1] The election of both churchwardens is the act of the whole vestry, whether the minister and parishioners agree in their choice, or the minister chooses one and the parishioners the other. In the latter alternative, therefore, the vote of the minister is exhausted in choosing his own warden, and he cannot also vote as a parishioner in the election of the other warden; though if there is an equality of votes in this election, he apparently can, as chairman of the vestry, decide it by a casting vote.[2] In the case of all churches built under the Church Building or New Parishes Acts, except those which have no district attached to them, two churchwardens are to be annually chosen at Eastertide, one by the minister and the other by the persons entitled to attend and vote at a meeting in the nature of a vestry for the parish or district attached to the church.[3] If

[1] Butt *v.* Fellowes (1843) 3 Curt. 680.

[2] Stoughton *v.* Reynolds (1736) 2 Str. 1045; R. *v.* Bp. of Salisbury (1901) 1 K. B. 573; aff. 2 K. B. 225.

[3] (1818) 58 Geo. 3, c. 45, s. 75; (1838) 1 & 2 Will. 4, c. 38, s. 25; (1843) 6 & 7 Vict. c. 37, s. 17; (1845) 8 & 9 Vict. c. 70, ss. 6, 7; (1856) 19 & 20 Vict. c. 104, ss. 14, 15.

the church has no district attached to it, the choice of the second warden is vested in the pewrenters, or, if there are no rented pews, the minister selects both wardens.[1] Churchwardens, after their appointment, have no legal right to exercise their office until they have been admitted by the archdeacon at his visitation, or by the bishop or his chancellor during the years of episcopal visitation, when the archdeacon is inhibited and cannot act. Till then, their predecessors remain in office, notwithstanding that their year has expired, and their successors have been appointed.[2]

4. The two churchwardens are sometimes distinguished as the parson's or vicar's warden and the people's warden. But there is no legal precedence or seniority between the two, and though chosen differently their duties are identical.[3] These may be enumerated as follows: (*a*) The care of the fabric of the church, with its ornaments and furniture, and of the churchyard; and the duty of keeping them in proper repair and condition and of adequately insuring against fire so far as funds are in hand for the purpose, except,

[1] (1838) 1 & 2 Will. c. 38, s. 16; (1845) 8 & 9 Vict. c. 70, s. 7.

[2] Canon 118; Bray *v.* Somer (1862) 2 B. & Sm. 374 : 8 Jur. N. S. 716; Bremner *v.* Hull (1866) L. R. 1 C. P. 748; Reg. *v.* Sowter (1901) 1 K. B. 66; rev. *Ib.* 396. For further particulars as to the qualifications and election of churchwardens of ancient parish churches and the churches enumerated in the note to ch. i. § 6 above, see Sm. Churchw. 22–43.

[3] Sm. Churchw. 34, 59–64.

as regards the chancel, where the rector is liable for its repair.[1] They have no proprietary rights in the church or its fixtures or in the churchyard, but the movable articles in the church, including the bells and bell-ropes, and sums of money given to the church, belong to them as a corporation for that purpose.[2] (*b*) The seating of the parishioners and other churchgoers in the church, including the chancel, subject, however, as regards the chancel of an old parish church, to the right of the rector, whether spiritual or lay, and his family, to the chief seat, and to his disposal of the other chancel seats if the bishop or churchwardens take no action respecting them. In this duty the churchwardens act as the officers of the bishop, and are subject to his control if any complaint is made against them. Neither the vestry nor the incumbent, nor any individual parishioner, can interfere with their discretion in the matter, except by appealing to the bishop. (*c*) The provision at the expense of the parish of sacramental bread and wine and a surplice for the minister, as required by Canons 20 and 58. (*d*) The maintenance of order in the church and churchyard during Divine service. (*e*) The collection of the money at the offertory, and concurrence with the minister in its disposal to pious and charitable uses. (*f*) The

[1] Stat. 13 Edw. 1 (*Circumspecte agatis*) ; Canon 85 ; ch. ix. § 3 below.

[2] Att.-Gen. *v.* Ruper (1722) 2 P. Wms. 125.

charge of the church and benefice and of providing for the cure of souls during a vacancy in the living, if, as is usually the case, they are appointed sequestrators, but not otherwise.[1] Churchwardens can neither add to, alter, or remove any part of the church or its fittings without a faculty, nor can they interfere with the clergyman in his ministrations unless his conduct is such as to be riotous, violent, or indecent within the meaning of the Act of 1860 against brawling.[2] The rights and duties of the incumbent on the one hand, and of the churchwardens on the other, in respect of the church and churchyard and the money and property of the Church, are so interlaced, that on many points friction cannot be avoided without that harmonious co-operation which should always exist between them, or, if this is unfortunately impossible, at any rate without mutual forbearance and concession.

5. The 90th Canon directs that the minister and parishioners in every parish, if they can agree, shall yearly in Easter week choose two or three or more discreet persons as sidemen (or, as they are now called, sidesmen) to assist the churchwardens in performing the duties of their office. If no agreement is come to, they are to be appointed by the bishop. This Canon only

[1] Sm. Churchw. pt. iii. ch. i.–iii.; pp. 50–84.

[2] 23 & 24 Vict. c. 32. A clergyman can be proceeded against for brawling either under that Act or in the Church courts as an ecclesiastical offender.

applies to ancient parishes, and therefore sidesmen appointed, as is frequently the case, in new ecclesiastical parishes have, strictly speaking, no legal status. They are, however, frequently treated as if they possessed it, and in these, as well as in ancient parishes, assist the churchwardens in seating the people and taking the collections in church. No practical harm is likely to result from this unless they undertook such a duty as, for instance, the forcible ejection of a person misbehaving in church, in which case their right to do so might be called in question.

6. In addition to the churchwardens a body of Church trustees may now be appointed in any parish to accept contributions and hold funds for certain defined ecclesiastical purposes.[1] They are to consist of the incumbent and two householders or owners or occupiers of land in the parish, chosen in the first instance and on the happening of a vacancy, one by the patron and the other by the bishop, the incumbent being chairman. They are a body corporate under the name of the Church Trustees of the parish in which they are appointed,

[1] Viz. "the building, rebuilding, enlargement, and repair of any church or chapel, and any purpose to which by common or ecclesiastical law a church rate is applicable." (1868) 31 & 32 Vict. c. 109, s. 9. Besides necessary church repairs, sacramental bread and wine, and other articles needed for Divine service, a church rate could, with the consent of a majority of the vestry, be applied to provide an organ and other church furniture, and to pay the salaries of organist, pew-openers, and other lay officials, but not the stipend of the incumbent or a curate. 1 Burn, 388 *a*, *b*.

with perpetual succession and a common seal, and power to sue and be sued in their corporate name. As circumstances from time to time require, they may pay over funds in their hands to the churchwardens to be applied to the defined ecclesiastical purposes of the parish generally or to one or more of them specifically, due regard being had to any particular directions of the donors. Funds not so paid over may be invested in government or real securities and accumulated, with a view to the capital or income being applied at a subsequent time. At least once a year the trustees must lay before the vestry all accounts and particulars of their receipts and expenditure during the preceding year, and of the balance of funds in their hands.[1]

7. The appointment and duties of the parish clerk vary in old and new parishes, and depend in some cases on custom. In old parishes the office is a freehold, and the right of appointment usually rests with the incumbent, who can exercise it even when the living is sequestrated owing to his bankruptcy; but in case of his being under suspension, it devolves on the curate in charge. The right, however, may by custom belong to the parishioners in vestry. An old writer compared the parish clerk to a bat, as being half-bird, half-beast, or half-clerical and half-lay, though he considered that his clerical wings outbalanced

[1] (1868) 31 & 32 Vict. c. 109, s. 9.

his lay body. But it is now held that the office is temporal, and not spiritual.[1] A person in holy orders may, however, with the consent of the bishop, be appointed parish clerk under the Lecturers and Parish Clerks Act, 1844, and, if so appointed, he is removable in the same way as a stipendiary curate. The same Act provides for the suspension or removal by the archdeacon, of a parish clerk not in holy orders, who has been guilty of neglect or misbehaviour in his office, or of misconduct which renders him unfit to hold it.[2] In all new ecclesiastical parishes, on the other hand, the appointment of the clerk rests with the incumbent, and, in the case of churches and chapels provided under the Church Building Acts of 1818 and 1819, is made annually; while in the case of those provided under the New Parishes Acts of 1843, 1844, and 1856, the clerk does not vacate his office at the end of each year, but may at any time be removed by the incumbent, with the consent of the bishop, for misconduct.[3]

8. There is no universal rule as to the appointment, duties, and tenures of office of the sexton or sacristan. Where, in accordance with the etymo-

[1] Canon 91; The Parish Clerk's Case (1610) 13 Co. Rep. 70; Pinder *v.* Barr (1854) 4 E. & B. 105; Lawrence *v.* Edwards (1891) 1 Ch. 144; 2 Ch. 72.

[2] 7 & 8 Vict. c. 59.

[3] (1819) 59 Geo. 3, c. 134, s. 29; (1856) 19 & 20 Vict. c. 104, s. 9; Reg. *v.* Ossett (1851) 16 Q. B. 975; Jackson *v.* Courtenay 1857) 8 E. & B. 8.

logy of his name, his duties are confined to the custody of the sacred vessels and vestments, the care and cleaning of the church, the opening and closing of the doors, and the ringing of the bells, his appointment, in the absence of a contrary practice, will naturally rest with the churchwardens. Where, on the contrary, he has only to do with the churchyard and grave-digging, his appointment will be presumed to be in the hands of the incumbent. If, however, he is charged with both sets of functions, the incumbent and the churchwardens jointly will be presumed to have the right of appointing him. On the other hand, in some few ancient parishes he is elected by the vestry. The office may be held by a woman, and in some places is a freehold for life; but usually it is held during pleasure, and the power of removal rests in the same hands as that of the appointment.[1] In new ecclesiastical parishes the sexton is to be appointed by the incumbent, and, with the consent of the bishop, is removable by him for misconduct.[2]

9. Another old parochial office was that of beadle—the bidder, crier, or messenger of the parish—whose duty was to attend in that capacity

[1] Ile's Case (1671) 1 Ventr. 153; R. *v.* Thame (Churchwardens) (1719) 1 Str. 115; Olive *v.* Ingram (1739) 2 Str. 1114; R. *v.* Taunton St. James (Churchwardens) (1776) 1 Cowp. 413; R. *v.* Minister, &c., of Stoke Damerel (1836) 5 A. & E. 584, 590, sq.; Cansfield *v.* Blenkinsop (1849) 4 Ex. 234.

[2] (1856) 19 & 20 Vict. c. 104, s. 9.

on the incumbent, churchwardens, and vestry. His position and duties were rather civil than ecclesiastical, but the vestry could sanction his salary being paid out of the church rate. He was also frequently employed to keep order in the church and churchyard during Divine service; and the Church Building Act, 1831, enumerates the payment of the salaries of beadles and pew-openers as well as of the clerk, as one of the expenses incidental to the performance of Divine service, to be paid out of the rents of pews in churches built under that Act.[1]

10. The organist and choristers, and any other lay officials beyond those already mentioned, who may be employed in or about the church or churchyard, are under the exclusive control and direction of the incumbent, and, as a rule, are appointed by him. But in some parishes the organist is, or was, when paid out of the church rate, selected by the vestry. Whether he is appointed by them or by the incumbent, his office is not a freehold; but he as well as the other officials now under consideration may be dismissed from office on proper notice, the length of which should be laid down at the time of appointment. If no time is then fixed, the proper length of notice may, in case of dispute, be a very difficult question to decide. It will depend in part on the terms of the engagement, and of the salary. If the salary be so much per month,

[1] 1 & 2 Will. 4, c. 38, s. 16.

probably one month's notice of dismissal would suffice. Not less than three months' notice would be requisite if the salary is so much per quarter; while if the salary is an annual sum, even this notice might perhaps be insufficient. Whatever be the mode of appointment and terms of the engagement of the organist, the incumbent has, within the bounds of legality, and so far as he does not voluntarily surrender it, the absolute right to control the use of the organ and the performance of music in the church, both during Divine service and at other times.[1] But, unless he is prepared to defray the cost out of his own pocket, this right must, of course, in practice, be limited by the extent to which the parishioners or congregation are willing to give the necessary financial support to his arrangements.

11. The old rank of reader, which was formerly one of the minor orders, was temporarily revived after the Reformation to supplement the lack of clergy, and seems to have been continued in some remote districts till the close of the eighteenth century.[2] It has in recent times been resuscitated as a lay office.[3] Moreover, the practice has

[1] Wyndham *v.* Cole (1875) 1 P. D. 130.

[2] 3 Burn, 452; Strype's Annals, vol. i. ch. xiii., xxx. pp. 178–81, 345, sq.; (ed. 1824, pp. 265–69, 514–16); Martyn *v.* Hind (1776) 2 Cowp. 437, 438–39, 444.

[3] Particulars as to readers and their powers and functions in consecrated buildings and elsewhere will be found in another Handbook of the present Series: *Lay Work and the Office of Reader*, by Dr. Yeatman-Biggs, afterwards made Bishop of Worcester.

of late years increased of the lessons being read in church by laymen at the request of the incumbent, without the express sanction of the bishop. But an incumbent ought not, without that sanction, to permit a layman to take any other part in any service in a consecrated building. The officiating of a layman in an unconsecrated building does not stand quite on the same footing; but, as a matter of Church order and regularity, the approval of it by the bishop should be procured, through the layman being expressly authorised as a lay reader, or in some other manner, especially if the building is licensed for Divine worship. All such laymen must, of course, act with the consent, and under the direction, of the incumbent of the parish.

12. Laymen and women engaged in less formal kinds of parochial work (among which is the visiting of the poor and sick contemplated by Canon 13 as one of their occupations on Sundays and other holy days) are responsible to the incumbent alone, and should act with his permission and under his directions. The Sunday schools, with their superintendents and teachers, are under his sole control. His powers with regard to the religious instruction given in any Church elementary school in the parish depend upon the terms of the trust-deed or scheme (if any) regulating the school, and upon the subsection in the Education Act, 1902, that religious

instruction given in a public elementary school not provided by the local authority shall, as regards its character, be in accordance with the provisions (if any) of the trust-deed relating thereto, and shall be under the control of the managers; provided that nothing in the subsection is to affect any provision in a trust-deed for reference to the bishop or superior ecclesiastical or other denominational authority, so far as such provision gives to the bishop or authority the power of deciding whether the character of the religious instruction is or is not in accordance with the provisions of the trust deed.[1]

13. Parochial church councils, where they exist, like ruridecanal and diocesan conferences, rest at present on a purely voluntary basis. Whatever, therefore, may be their advantages, and however desirable may be their incorporation into our regular Church system, the parish clergy stand as yet in no legal relation to them.

[1] 2 Edw. 7, c. 42, s. 7 (6).

CHAPTER V

DIVINE SERVICE

1. Every deacon and priest before his ordination, and, as mentioned above, every incumbent, before he is admitted to his benefice, and every stipendiary curate, on entering upon his curacy, declares that in public prayer and administration of the sacraments he will use the form prescribed in the Book of Common Prayer and none other except so far as ordered by lawful authority.[1] This uniform use is enjoined by the Acts of Uniformity and the Prayer Book itself, which has legal force as part of the Act of 1662, and by the 14th Canon, except so far as modifications are permitted under the Act of Uniformity Amendment Act of 1872, which, like the Act of 1662, was passed at the instance of Convocation.[2] No clergyman, therefore, may alter, add to, or diminish the form of worship therein

[1] Ch. ii. § 6 (i.); ch. iii. § 1; (1865) 28 & 29 Vict. c. 122, ss. 1, 4–8.

[2] (1559) 1 Eliz. c. 2; (1662) 14 Cha. 2, c. 4; (1872) 35 & 36 Vict. c. 35; Westerton *v.* Liddell (1857) Moore's Special Report, 187; Martin *v.* Mackonockie (1868) L. R. 2 P. C. 365, at p. 383; 38 L. J. Eccl. 1, at p. 11.

prescribed, including the lessons.[1] The expression "lawful authority" occurs in the Act of 1662, which directs that in those portions of the Prayer Book which relate to the King, Queen, or Royal progeny the names shall be altered from time to time as occasion requires according to the direction of lawful authority. This is explained by Bishop Gibson to mean, according to practice, the authority of the Sovereign in Council.[2] The archbishops and bishops have no authority, combined or singly, to order modifications of or additions to the forms of Divine service, except to the extent permitted by the Act of 1872. The Preface to the Prayer Book "Concerning the Service of the Church" expressly contemplates that in lieu of diversity of use in different dioceses and parts of the realm, all shall henceforth have but one use. The only function of the prelates which it recognises in the matter is the power of the bishop to set at rest any doubts which may arise as to the construction of the Prayer Book and the proper practice thereunder, with liberty to him, if he is himself in doubt, to refer to the archbishop. But the Act of 1872 permits (*a*) the use, upon a special occasion approved by the ordinary, of a special form of service approved by him, and containing nothing except anthems or hymns, which does

[1] Newbery *v.* Goodwin (1811) 1 Phill. 282.
[2] Gibs. Cod. 280; see note to ch. ii. § 6 (i.) above.

not form part of the Holy Scriptures or Book of Common Prayer, and also (*b*) the use, on any Sunday or holy day, as supplementary to the services prescribed by the Prayer Book, of an additional form of service, approved by the ordinary as to its form and mode of use, and containing no portion of the Communion Service and nothing except anthems or hymns which does not form part of the Holy Scriptures or Book of Common Prayer. The same Act authorises the use of a shortened order for Morning or Evening Prayer on any day except Sunday, Christmas Day, Ash Wednesday, Good Friday, and Ascension Day; and the use of the Morning Prayer, the Litany, and the Communion Service, in varying order as separate services,[1] and the saying of the Litany after the third collect in Evening Prayer, without prejudice to any legal powers vested in the ordinary, and either with or without a sermon, lecture, or homily; and also the preaching of a sermon without being preceded by a service appointed by the Prayer Book, provided that it be preceded by a service authorised by the Act, or by a collect from the Prayer Book with or without the Lord's Prayer.

2. The Prayer Book contains an "Order for Morning and Evening Prayer daily to be said and used throughout the year"; and under the

[1] As to the normal order independently of the Act, see the Rubrics and note to § 7 below.

prefatory heading "Concerning the Service of the Church," it is directed that all priests and deacons are to say daily the Morning and Evening Prayer either privately or openly, not being let by sickness or some other urgent cause. And the curate who ministers in a parish church, being at home and not being otherwise reasonably hindered, is to say the same in the church, after summoning the people by a bell to come and hear God's word and pray with him. A bishop, however, has no power to enforce daily services;[1] and daily service has been held not to be requisite under a trust to perform the service "in strict and literal accordance with the order of the Book of Common Prayer."[2] But the Act of Uniformity of 1662, s. 1, expressly enacts that the morning and evening prayers contained in that Book shall, on every Lord's Day, and on all other days and occasions, and at the times therein appointed, be openly read by every minister or curate in every church, chapel, or other place of public worship.[3] And the 14th and 15th Canons direct that the Common Prayer shall be said or sung distinctly and reverently upon such

[1] Cripps, 576.

[2] *Re* Hartshill Endowment (1861) 30 Beav. 130.

[3] This applies only to a church served by a distinct minister, and not where there are two churches in one parish. But even in such a case the incumbent has no right wholly to close one church and hold all the Sunday services in the other; Rugg *v.* Bp. of Winchester (1868) L. R. 2 P. C. 223; 38 L. J. Eccl. 23.

days as are appointed to be kept holy by the Prayer Book and their eves, and that the Litany shall be said or sung when and as prescribed in the Prayer Book; and in particular on Wednesdays and Fridays weekly, though they be not holy days, the minister at the accustomed hours of service is to resort to the church and say the Litany after warning the people by tolling a bell. A later enactment empowers the bishop, at his discretion, to order two full services (each, if he so directs, to include a sermon or lecture) on every Sunday throughout the year or any part of the year in the church or chapel of any benefice, whatever its annual value or population, and also in certain cases where a benefice is composed of more than one parish or chapelry, in the church or chapel of each of them.[1] And where he considers that the population requires it, he may direct the celebration on Sundays and the great festivals of a third service, being either the Morning or Evening Service with a third sermon, and for the performance of this third service may insist on a curate being nominated, whose salary is to be provided by the pews being specially let for the service or by subscription.[2] It is rarely necessary in the present day to put in force these powers, since in most parishes the number of services considerably exceeds the legal *minimum*.

[1] (1838) 1 & 2 Vict. c. 106, s. 80.
[2] (1818) 58 Geo. 3, c. 45, ss. 65, 66.

3. Under the rubrics following the Nicene Creed and at the beginning of the Marriage Service, as modified by the Parish Notices Act, 1837,[1] the minister is alone authorised to give out notices during Divine service; and he may not publish either during or after Divine service notices of proceedings in ecclesiastical courts, or of vestry meetings, or of any other matter except banns of matrimony, announcements of the Communion, and of holy days and fasting days during the ensuing week, and of anything else prescribed by the Prayer Book or enjoined by the King or the ordinary. Other notices must be put up at or near the church door. Banns are to be published at the time of Morning Service (or of Evening Service if there is no Morning Service) immediately after the Second Lesson. Other lawful notices are to be given at the close of the Nicene Creed.

4. The only rubrical provision for the collection of money during Divine service is at the time when the offertory sentences are read, whether a Communion follows or not. The money is then to be received by the deacons, churchwardens, or other fit person,[2] and is to be disposed of to such pious and charitable uses as the minister and church-

[1] 7 Will. 4 & 1 Vict. c. 45.

[2] The appointment of such person rests with the incumbent or principal officiating minister; a clergyman in priest's orders is not a "fit" person to collect the offertory money. Cope *v.* Barber (1872) L. R. 7 C. P. 393.

wardens think fit; wherein if they disagree, it is to be disposed of as the ordinary shall appoint. Money collected at other times during Divine service ought to be brought up to the minister to be placed on the Holy Table, like the offertory money; but, unlike this, it is under the sole control and disposal of the incumbent; unless it is collected for church expenses or repairs for which the churchwardens are responsible, in which case it should be handed over to them.[1] And if the purpose for which the collection is made is announced beforehand, there is, of course, a legal as well as moral obligation to apply the money collected to that purpose. Offertory alms collected in a chapel are at the disposal of the incumbent and wardens of the parish church.[2]

5. Questions arose during the last century as to (*A*) the legality of certain ornaments of the Church, (*B*) the dress of the clergy, and (*C*) ceremonies in connection with Divine service, and especially with the Holy Communion; having regard, among other considerations, to the Ornaments Rubric in

[1] Sm. Churchw. 80; Reg. *v.* O'Neill (1867) 31 J. P. 742; Howell *v.* Holdroyd (1897) P. 198. An incumbent often takes sole charge not only of money collected in church but of money collected by appeals within and outside the parish. He should in all such cases lodge it at a bank on a separate account, and notify in his appeal that this will be done. He cannot otherwise reasonably expect to be entrusted with money by strangers; and if the money is mixed with his own, it may be difficult or impossible to disentangle it in the event of his sudden illness and death.

[2] Moysey *v.* Hillcoat (1828) 2 Hag. Eccl. 30, at p. 56.

the Prayer Book. According to the legal decisions on these questions:[1] (*A*) The Holy Table must be of wood and, according to Canon 82, should be covered during Divine service with a carpet of silk or other decent stuff, and with a fair linen cloth at the time of the ministration.[2] A crucifix, except as a mere architectural decoration or as part of an historical representation of the Crucifixion, is illegal; but a cross is legal, provided it be not upon or in actual or apparent

[1] As stated in ch. i. § 4, these decisions are part of our Church law, until reversed or altered by future judicial decisions or by legislation. As intimated in the Preface, no opinion is here expressed as to their correctness, or as to what the law ought to be on the points with which they deal. It has been questioned whether in the Ornaments Rubric and in the Act of Uniformity of 1559 (1 Eliz. c. 2), from which it is derived, the mention of such ornaments as were in the Church by authority of Parliament in the second year of Edward VI. refers to the ornaments sanctioned by the First Prayer Book of Edward VI., the use of which was enjoined by the Act of Uniformity of 1549 (2 & 3 Edw. 6, c. 1), or to those previously in use. It may be observed that this Act is referred to as made in the second year of the reign in the later Act of Uniformity of 1552 (5 & 6 Edw. 6, c. 1, s. 4), and the Book itself is associated with that year in the 36th Article. In the Bp. of Winchester's Case (1596) 2 Co. Rep. 40 a, the Payment of Tithes Act of the same session (2 & 3 Edw. 6, c. 13) is referred to as made in the Parliament holden in the second year of Edward VI. See also Westerton *v.* Liddell (1857) Moore's Special Report, 156, 160; Martin *v.* Mackonockie (1868) L. R. 2 P. C. 365, at p. 390; Elphinstone *v.* Purchas (1870) L. R. 3 A. & E. 66, 94.

[2] Faulkner *v.* Litchfield (1845) 1 Rob. Eccl. 184; Westerton *v.* Liddell (1857) Moore's Special Report, 176–185. A variety of embroidered cloths is permissible; *Ib.* 188. But the decision in *Re* St. Luke's, Chelsea (1904) P. 257, that marble is "stuff" within Canon 82, seems open to question.

contact or connection with the Holy Table.[1] Candlesticks and vases of flowers are legal even in such contact or connection,[2] and so are pictures or sculptures of an historical or allegorical character, whether in a reredos or elsewhere in the church, except those known as the Stations of the Cross, which have been held liable to superstitious abuse.[3] The legality of isolated figures, whether painted or sculptured, depends on whether from their character and position there is no likelihood of their being superstitiously reverenced.[4] A credence table is legal and proper.[5] A second Holy Table is only legal if placed in a part of the church closed in, by lattice work or otherwise, as a separate place of worship for services attended by few worshippers.[6] Chancel gates are permitted, if required for the protection of the chancel when the church is accessible for private prayer; but they must be always kept

[1] Phill. Eccl. Law, 733–5; Liddell *v.* Beal (1860) 14 Moo. P. C. 1, 14; Durst *v.* Masters (1876) 1 P. D. 373; Ridsdale *v.* Clifton (1877) 2 P. D. 276; Bradford *v.* Fry (1878) 4 P. D. 93, 106; *Re* St. Matthias, Richmond (1897) P. 70; *Re* St. Ethelburga (1900) P. 80; *Re* St. John Baptist, Paignton (1905) P. 111.

[2] Liddell *v.* Beal, *ubi sup.*; Elphinstone *v.* Purchas (1870) L. R. 3 A. & E. 66.

[3] Boyd *v.* Phillpotts (1874) L. R. 4 A. & E. 297; (1875) 6 P. C. 435; Hughes *v.* Edwards (1877) 2 P. D. 361; *Re* St. Mark, Marylebone (1898) P. 115; Davey *v.* Hinde (1901) P. 95; (1903) P. 221.

[4] *Re* St. Lawrence, Pittington (1880) 5 P. D. 131; *Re* St. John, Pendlebury (1895) P. 178.

[5] Westerton *v.* Liddell (1857) Moore's Special Report 187, 8; overruling Faulkner *v.* Litchfield (1845) 1 Rob. Eccl. 184.

[6] *Re* Holy Trinity, Stroud Green (1887) 12 P. D. 199; *Re* St. Mark, Marylebone (1898) P. 115.

open during Divine service.[1] The erection of a baldacchino or canopy over the Holy Table is not permissible.[2] But the introduction of legal ornaments and additions into a church will not ordinarily be sanctioned without the approval of the parishioners, expressed by a resolution of the vestry.[3] (*B*) The legal attire of the ministering clergy at the Holy Communion, as well as in other ministrations, has been decided to be that laid down by the Advertisements of 1566, which are followed in Canons 24, 25, and 58, and prescribe the wearing of a surplice with the proper hood of the university degree (if any); except that in cathedral and collegiate churches the celebrant and gospeller and epistler shall wear copes. The rubric of the First Prayer Book of Edward VI., had directed that the celebrant should wear a white albe plain with a vestment (*i.e.* a chasuble) or cope, and any assistant priests or deacons should wear albes with tunicles.[4] Stoles, as distinguished from the scarves of chaplains, have no legal authority.[5] A biretta (the foreign form of a college cap) must not be worn during the Com-

[1] *Re* St. Agnes, Toxteth Park (1885) 11 P. D. 1; *Re* St. John Baptist, Timberhill (1895) P. 71.

[2] White *v.* Bowron (1873) L. R. 4 A. & E. 207; 43 L. J. Eccl. 7.

[3] Groves *v.* Rector of Hornsey (1793) 1 Hag. Cons. 188; Clayton *v.* Deane (1849) 7 Not. of Ca. 46, 53; Vicar of Tottenham *v.* Venn (1874) L. R. 4 A. & E. 221; Peek *v.* Trower (1881) 7 P. D. 21; Nickalls *v.* Briscoe (1892) P. 269. See also note (1) on p. 146 below.

[4] Ridsdale *v.* Clifton (1877) 2 P. D. 276. See note (1) on p. 87.

[5] Elphinstone *v.* Purchas (1870) L. R. 3 A. & E. 66.

munion Service.[1] In preaching (except, possibly, during the Communion Office) the surplice or the black gown are equally legal.[2] (*C*) The ceremonial use of incense and processions with lighted candles are illegal,[3] but a celebration of Holy Communion with two lighted candles on or above the table is permissible.[4] The administration of the mixed chalice is legal, but the wine and water must not be ceremonially mixed during the service.[4] Wafers, not consisting of bread "such as is usual to be eaten," have been held illegal.[5] The singing of the Agnus Dei or of any other hymns during the administration of the elements is permissible.[6] A minister may stand either on the north or the west side of the table during the service; but not so as to hide the manual acts from the people.[4] He must not kneel or bow before the elements during the Prayer of Consecration, or elevate them above his head during administration; nor may he use the

[1] Enraght's case (1881) L. R. 6 Q. B. D. 376; (1882) 7 A. C. 240.

[2] *Re* Robinson: Wright *v.* Tugwell (1897) 1 Ch. 85.

[3] Sumner *v.* Wix (1870) L. R. 3 A. & E. 58; The Archbishops on Incense and Lights in Processions: Hearing at Lambeth (1899) *Times*, Aug. 1 (also published by Macmillan & Co., 1899, price 1s.)

[4] Read *v.* Bishop of Lincoln (1891) P. 9; (1892) A. C. 644.

[5] Ridsdale *v.* Clifton (1877) 2 P. D. 276. The First Prayer Book of 1549 prescribed unleavened wafers, but directed that each must be divided and distributed in two or more pieces, in order, no doubt, that the symbolism indicated in 1 Cor. x. 17 might not be wholly lost.

[6] Read *v.* Bishop of Lincoln, *ubi sup.* The legality of the usual hymns and music has been long recognised; Hutchins *v.* Denziloe (1792) 1 Hag. Cons. 170.

sign of the cross during the absolution or benediction.[1] Ablutions of the paten and chalice after the benediction, being no part of the service, are not illegal.[2] Reservation of any parts of the consecrated elements at the close of the Communion Service is illegal.[3]

6. No minister is to refuse or delay to christen according to the form of the Book of Common Prayer any child brought to him to the church for that purpose on a Sunday or holy day, after notice given to him overnight or in the morning before the beginning of Morning Prayer. The ceremony should take place immediately after the second lesson at either Morning or Evening Prayer. The congregation can then testify the receiving of the newly baptized into the number of Christ's Church, and all present are reminded of their own profession made to God in their baptism. But if necessity requires, children may be baptized on any other day.[4] The law is the same as regards children of Church people and of Dissenters, and as regards legitimate and illegitimate children. If a minister is duly informed of the weakness and danger of death of an unbaptized infant in the parish, and is desired to go and baptize him, he must not refuse or so delay that the infant dies

[1] Martin *v.* Mackonockie (1868) L. R. 2 P. C. 365 ; (1869) L. R. 3 P. C. 52 ; Read *v.* Bishop of Lincoln, *ubi sup.*

[2] Read *v.* Bishop of Lincoln, *ubi sup.*

[3] Archbishops' Hearing at Lambeth (1900) *Times*, May 2. See ch. viii. § 1.

[4] Canon 68 ; Prayer Book Rubric.

through his fault unbaptized.[1] But in every other case a male child must have two godfathers and one godmother, and a female child one godfather and two godmothers; and a minister will, of course, not admit as a sponsor a person notoriously leading an immoral life or otherwise manifestly unfit for the office. Godparents must have received the Holy Communion, and a father cannot be godfather for his own child.[2] In 1865 the Canterbury Convocation, with the Royal licence, framed a new canon repealing this prohibition; but the canon was never ratified by the Crown, nor was any similar canon passed by the York Convocation. The Form for the ministration of Private Baptism in houses contains a service for the public reception in church, as one of the flock of true Christian people, of a child who, in case of emergency, has been baptized at home, and also a formula of conditional baptism to be substituted for the words of actual baptism in cases where there is a doubt whether the essential parts of the Sacrament were observed in the private performance of the ceremony. The rubrics direct immersion in the case of the public baptism of infants, if the godparents certify that the child can endure it, and affusion, if they certify that the child is weak. Naturally, affusion alone is directed in the case of private baptism. In the case of the baptism of adults, immersion or affusion are directed as alternatives, the discretion being

[1] Canon 69. [2] Canon 29.

left with the minister and not with the godparents. The rubric directs that, before adult persons are to receive baptism, not less than one week's previous notice shall be given to the bishop, or a person appointed by him, by the parents or some other discreet persons, in order that due care may be taken for their examination as to their knowledge of the principles of the Christian religion, and that they may be exhorted to prepare with prayers and fasting for the reception of that holy Sacrament. The baptismal services throughout contemplate the performance of the ceremony by a priest; but in the Form of Making of Deacons a deacon is expressly authorised to baptize infants in the absence of the priest. Lay baptism is valid in case of emergency; but, of course, a layman is not at liberty to use the baptismal service.

7. The Holy Communion is to be administered in every parish church and chapel so often and at such times as that every parishioner may communicate at least twice in the year (whereof the feast of Easter shall be one).[1] Warning is to be given to the parishioners "publicly in church at Morning Prayer" on the Sunday before every time of administering the Holy Communion,[2] and the present rubric requires that so many as intend to be partakers of the Sacrament shall signify their names to the curate, meaning the incumbent, at least some time the day before. In the First

[1] Canon 21; Prayer Book Rubric. [2] Canon 22.

Prayer Book of Edward VI. this rubric ran: "So many as intend to be partakers of the Holy Communion shall signify their names to the curate overnight or else in the morning afore the beginning of Matins or immediately after."[1] The incumbent must not deny the Sacrament, without lawful cause, to any person that devoutly and humbly desires to receive it.[2] But he is directed both by the Canons and by the rubric to repel from Communion, until repentance, open and notorious evil livers, and those who have wronged their neighbours by word or deed so as to offend the congregation, and those between whom he perceives malice and hatred to reign. The Canons add to the list common and notorious depravers of the Book of Common Prayer, or the Ordering of Bishops and Priests, or the Thirty-nine Articles,

[1] This rubric, with the substitution of "Morning Prayer" for "Matins," was repeated in the Prayer Books of 1552 and 1559. On the other hand, in our present Prayer Book, where the allusion to Morning Prayer is omitted from the rubric, the intention that it shall, in the ordinary course, precede the Holy Communion is indicated by the fact that Matt. xxvi. and John xviii. have been removed from the Gospels for Palm Sunday and Good Friday, where they had previously stood with the succeeding passages which form our present Gospels for those days, and have been made the Second Lessons at Morning Prayer. In the earlier Prayer Books no special second lessons were assigned for those two days. But as to the use of Morning Prayer, the Litany, and the Holy Communion together, or in varying order as separate services, see now § 1 above. The Prayer Book does not seem to contemplate Communion more than once in the day. Where the Office is used oftener, it must be repeated entire on each occasion.

[2] (1547) 1 Edw. 6, c. 1, s. 8.

or depravers of the sovereign authority of the King in causes ecclesiastical, and those who refuse to kneel when receiving the Communion or to be present at public prayers according to the order of the Church of England. When any one is so repelled, the incumbent must report the matter to the ordinary within fourteen days, or sooner if required by the offending person or by the ordinary himself, and must obey his order and direction in reference to it. The rubric directs that the ordinary shall proceed against the offender according to the Canon, that is to say, by such ecclesiastical censures and punishments as can be inflicted.[1] In Jenkins *v.* Cook[2] the meaning of a "common and notorious depraver of the Book of Common Prayer" was discussed, and the Judicial Committee of the Privy Council held that it did not include a person who omitted certain parts of the Bible from his family reading because he held them, in their generally received sense, to be incompatible with religion or decency. But while they assumed that being a depraver of the Prayer Book would be as valid a cause for denying Communion as being an open and notorious evil liver, they did did not actually decide whether the Canons, which do not as such bind the laity, can of their own authority prescribe causes, sufficient or lawful, for

[1] Canons 26, 27, 109; Prayer Book Rubric.

[2] (1875) L. R. 4 A. & E. 463, rev. on app. (1876) 1 P. D. 80.

denying Communion within the meaning of the Act of 1547.[1] It would not be expedient in the present day for an incumbent, under Canons 28 and 57, to refuse the Communion to persons merely because they came from outside his parish to communicate in his church instead of in their own parish church. Nor can he lawfully refuse it to a person who occasionally attends or even communicates in a dissenting place of worship.[2] The question of admitting to Communion persons who have been baptized in another communion or Christian body, and have not been confirmed in the Church of England, is one of more difficulty. The rubrics in the Communion Office itself are silent on the subject. But the exhortation at the close of the Public Baptism of Infants directs that the child shall be brought to the bishop to be confirmed without delay after a sufficient course of instruction. The rubric at the close of the Baptismal Service for Adults declares the expediency of every person so baptized being confirmed by the bishop with all convenient speed after baptism, that so he may be admitted to the Communion; and the rubric at the end of the Order of Confirmation prescribes that there shall none be admitted to the Communion until such time as he be confirmed, or be ready and desirous to be confirmed. These rubrics must be read together, and are clearly

[1] See p. 94 above, and note (2) on that page.
[2] Swayne *v.* Benson (1889) 6 Times Law Rep. 7.

framed with a view to persons baptized in the Church of England. In fact the Prayer Book nowhere contemplates the case of a person who, having been validly baptized in another communion or body, afterwards joins the Church of England, or the case of a person belonging to some other communion who, while temporarily resident in England, desires, without forsaking his own communion, to communicate with his fellow Christians of our Church. As the rubrics stand, such persons, unless and until actually confirmed, have no right to require a clergyman to admit them to Communion, and he commits no legal offence by refusing to do so. On the other hand, a considerable number of such persons do, as a matter of fact, communicate in our Church without having been confirmed or being desirous to be confirmed; and a clergyman who admits them, in the absence of any direction of the bishop to the contrary,[1] may be acting in a wise and Christian manner.

8. The rubrics of the Communion Office prescribe that a sermon or one of the authorised homilies shall follow the Nicene Creed whenever that portion of the office is used, whether a Communion actually takes place afterwards or

[1] The passage in the statement *Concerning the Service of the Church* at the beginning of the Prayer Book, respecting the bishop taking order for the appeasing of doubts concerning the manner of understanding and carrying out the contents of the Book, might apply to the treatment of such persons.

not. And the 45th Canon enjoins the preaching of one sermon every Sunday of the year. The power of the bishop to require a second and even, in certain cases, a third sermon has already been noticed.[1] But, inasmuch as the Prayer Book contains no direction that sermons shall follow Matins or Evensong, such sermons may be regarded as in the nature of separate or additional services. The 55th Canon prescribes that all sermons, lectures, and homilies shall be preceded by what is called the Bidding Prayer and the Lord's Prayer. But this rule is not in practice observed in the case of sermons in the middle of the Communion Service or immediately following some other service. Under the Act of Uniformity Amendment Act of 1872, Morning and Evening Prayer, the Litany, and Holy Communion may any of them be used with or without the preaching of a sermon or lecture or the reading of a homily; and a sermon or lecture may be preceded either by one of the services appointed by the Prayer Book or by a service authorised by that Act, or by a Collect taken from the Prayer Book, with or without the Lord's Prayer.[2]

9. Regular catechising is enjoined both by the Canons and by the Prayer Book. But the direction in the 59th Canon, that it shall take place for half-an-hour or more before Evening Prayer, is superseded by the rubric at the end of the Catechism,

[1] § 2 above.

[2] 35 & 36 Vict. c. 35, ss. 5, 6.

which requires the incumbent of every parish diligently upon Sundays and holy days, after the second lesson at Evening Prayer, openly in the church to instruct and examine so many children of his parish sent to him as he shall think convenient, in some part of the Catechism.

10. The Churching of Women is regulated by the rubrics at the commencement and close of the service for the occasion in the Prayer Book. It is contemplated as the first service in which a woman takes part after recovery from childbirth; but no specific time is prescribed for it beyond the recommendation that she should receive the Holy Communion if there be a Communion. In former times a woman was not to be churched after an illegitimate birth unless she had previously done penance or acknowledged her fault before the congregation at the time of her churching. Since penance has fallen into disuse, a clergyman must exercise his own discretion in such cases; but he will, of course, neither church nor admit to Communion a woman who impenitently continues a sinful life. The rubric directs that "accustomed offerings" shall be offered at a churching, but their amount is not regulated by any general or well-established rule.[1]

[1] Phill. Eccl. Law, Pt. iii. ch. viii. pp. 645–7.

CHAPTER VI

MARRIAGE

1. With the exceptions mentioned in § 7 below, the incumbent or minister of the church of an ancient or new ecclesiastical parish, or of a church or chapel specially authorised for the publication of banns and solemnisation of marriages, is bound, in the case of persons who are legally competent to be married in that church or chapel, to publish or permit the publication of banns and solemnise or permit the solemnisation of marriage, either after due publication of banns or under a licence from the bishop or the Archbishop of Canterbury, and he may consent to the solemnisation of the marriage upon a proper registrar's certificate. If he improperly refuses publication of banns or solemnisation of marriage, it is an ecclesiastical offence for which he is liable to be punished under the Clergy Discipline Act, 1840, but it is a question whether he would be liable to a civil action or an indictment for the refusal.[1] On the other hand, a clergyman who knowingly

[1] Davis *v.* Black (1841) 1 Q. B. 900; Reg. *v.* James (1850) 3 C. & K. 167.

and wilfully solemnises a marriage in an unauthorised building or outside the lawful hours (unless under special licence from the Archbishop of Canterbury), or without due publication of banns (unless under licence from him or from the bishop, or upon a proper registrar's certificate), will be guilty of felony; and a marriage solemnised with the knowledge of the parties thereto elsewhere than in an authorised building or without publication of banns or the registrar's certificate, unless with a sufficient licence, will be void.[1]

2. The ancient parish churches were the original places for the publication of banns and solemnisation of marriages;[2] but the churches of new ecclesiastical parishes now stand upon the same footing in that respect as those of ancient parishes; and where a portion of an ancient parish has been formed into a new ecclesiastical parish, residents in the new parish are not deemed for those purposes to be within the old parish.[3] Moreover, if, besides the church, there is a public chapel in a parish, and the bishop thinks it necessary so to do for the convenience of the inhabitants, he may grant a licence, with such

[1] (1823) 4 Geo. 4, c. 76, ss. 21, 22.

[2] *Ib.* s. 2.

[3] (1818) 58 Geo. 3, c. 45, ss. 27–29; (1819) 59 Geo. 3, c. 134, ss. 6, 16, 17; (1830) 11 Geo. 4 & 1 Will. 4, c. 18, s. 3; (1843) 6 & 7 Vict. c. 37, s. 15; (1844) 7 & 8 Vict. c. 56; (1845) 8 & 9 Vict. c. 70, s. 10; (1856) 19 & 20 Vict. c. 104, s. 11; Tuckniss *v.* Alexander (1863) 32 L. J. Ch. 794; 11 W. R. 938; Fuller *v.* Alford (1883) 10 Q. B. D. 418.

qualifications as he may deem fit, for banns and marriages in the chapel, in the case of residence within a district specified in the licence; subject to an appeal on the part of either patron or incumbent to the archbishop of the province, who may confirm, revoke, or vary the licence. But the licence will not preclude residents in the district from having their banns published and marriages solemnised in the parish church, if they prefer this course.[1] In the case of parishes having no parish church in which Divine service is usually performed every Sunday, and in the case of extra-parochial places, the church or chapel of an adjoining parish or chapel may be resorted to for banns and marriages.[2] But the bishop may license for banns and marriages in extra-parochial places and chapelries any church or chapel situate within their limits.[3] Where the church of a parish is pulled down or disused for Divine service owing to being rebuilt or repaired, the publication of banns and solemnisation of marriages may take place in any building within the parish licensed by the bishop for the performance of Divine service during the rebuilding or repair of the church,

[1] (1836) 6 & 7 Will. 4, c. 85, ss. 26–34; (1837) 7 Will. 4 & 1 Vict. c. 22, ss. 33, 34; *Re* St. George's Proprietary Chapel (1890) Tristr. Cons. Judg. 134.

[2] (1823) 4 Geo. 4, c. 76, s. 23.

[3] *Ib.* ss. 3–5; (1857)20 Vict. c. 19, s. 9; (1860) 23 & 24 Vict. c. 24.

or if there is no such building, then in the church of an adjoining parish; or, if there is a consecrated chapel within the parish, the bishop may direct that they shall take place within that chapel, and may, with the consent of the incumbent, give directions respecting the fees. Licences for marriages in the church of the parish are to be construed as licences for marriages in the building, church, or chapel in which they may be temporarily solemnised.[1] Where a church has been rebuilt, repaired, or enlarged, and the position of the Holy Table altered, the validity of marriages and other ceremonies is not affected by the fact, if such is the case, of there having been no re-consecration.[2]

3. Persons are legally competent to intermarry who (*a*) are of a legal age to contract marriage, (*b*) are of sound mind, (*c*) have not at the time a wife or husband living with whom they have contracted a marriage which is recognised by English law and has not been declared void or been dissolved by a divorce *a vinculo* recognised by English law, and (*d*) are not within the prohibited degrees of consanguinity or affinity. A Christian and a non-Christian may be married in church, as well as Christians of different denominations; and a clergyman cannot make

[1] (1823) 4 Geo. 4, c. 76, s. 13; (1824) 5 Geo. 4, c. 32; (1830) 11 Geo. 4 & 1 Will. 4, c. 18, s. 2.

[2] (1867) 30 & 31 Vict. c. 133, s. 12.

religion or absence of religion a ground for refusing to perform the ceremony.[1]

4. The *minimum* legal age for contracting marriage is fourteen for the husband and twelve for the wife. In the case of minors the consent of parents or guardians is necessary to their marriage after banns. In the case of the marriage by licence of a minor who is not a widower or widow, the consent to the marriage must be obtained from the father if living, and if he is dead, from some one guardian of the minor (if any). The mother, whether still a widow or remarried, is by law a guardian of the minor unless she has been removed from the office by the High Court of Justice. If she has been so removed and she remains a widow, and there is no guardian in existence, her consent to the marriage is necessary. Where no requisite consenting party is in existence, the marriage may be solemnised without consent. If the father, mother, or other guardian is of unsound mind, or abroad, or unreasonably withholds consent, the Lord Chancellor or some other Chancery judge may on petition make declaration that the marriage is proper, which will supersede the necessity for the consent.[2] This consent of parents is not required in the

[1] Jones *v.* Robinson (1815) 2 Phill. 285; Reg. *v.* James (1850) 3 C. & K. 167.

[2] Canons 62, 100, 104; (1823) 4 Geo. 4, c. 76, ss. 8, 16, 17, read with (1886) 49 & 50 Vict. c. 27, ss. 2, 4, 6. 7.

case of a minor who is illegitimate.[1] A clergyman is not punishable who, without notice of the fact, solemnises the marriage of a party under the lawful age, or the marriage of a minor without the consent of parent or guardian; and the marriage of a minor above the marriageable age without such consent, if it actually takes place, is valid, and cannot be made void.[2] But the marriage of a person under the lawful age can be declared void by him or her on attaining that age. If, however, he or she then consents to the union, no remarriage is necessary.[3]

5. The marriage of a person who is a lunatic or of unsound mind is void, since such a person is not capable of consenting to the ceremony.[4] On the same principle, if a person is forced to go through the ceremony against his or her will, it is no marriage and void.[5]

6. Where a married person is absent and unheard of for seven years, a presumption of death arises, and the other party marrying again after the lapse of that time is not punishable for bigamy.[6] But the remarriage will of course be void if it subsequently appears that the absent party was actually alive at the time when it was solemnised.

[1] Horner *v.* Liddiard (1799) 1 Hag. Cons. 337.
[2] (1826) 4 Geo. 4, c. 76, ss. 8, 23.
[3] Co. Litt. 79 a. b. n. (1).
[4] (1811) 51 Geo. 3, c. 37. A lunatic cannot marry until he has been judicially declared sane; *Ib.*
[5] Scott *v.* Sebright (1886) 12 P. D. 21; Geary, 23–27.
[6] (1861) 24 & 25 Vict. c. 100, s. 57.

7. A divorce decreed by a competent Christian tribunal between persons domiciled in the country where it is obtained is regarded as valid in England, if valid according to the law of that country.[1] But if a person domiciled in England obtains a divorce in another country to which he has gone for the purpose, that divorce will not be recognised as legal here.[2] If persons obtain a dissolution of marriage by a judicial decree in England, the Divorce Act, 1857, authorises them to marry again after the time for appealing against the decree has expired, or after the marriage has, on appeal, been declared to be dissolved, in like manner as if the marriage had been dissolved by death. A person divorced in England has, therefore, a legal right to require his or her banns to be published and marriage to be solemnised in church in like manner as if he or she were a widower or widow, with the exception that no clergyman is by law bound to marry a person whose marriage has been dissolved on account of the person's own adultery; but in case of his refusal to do so he must permit any other clergyman willing to perform the ceremony to use his church for the purpose.[3] In the banns in such cases the person has to be described, if

[1] Harvey *v.* Farnie (1882) 8 App. Ca. 43.

[2] Dolphin *v.* Robins (1859) 7 H. L. C. 390; Briggs *v.* Briggs (1880) 5 P. D. 163.

[3] (1857) 20 & 21 Vict. c. 85, ss. 57, 58; (1868) 31 & 32 Vict. c. 77. s. 4.

at all (see § 10), as "unmarried." In the case of a person whose divorce elsewhere than in England is valid according to English law, it would seem that although he or she can legally remarry in England, yet a clergyman is under no legal obligation to publish the banns or perform the ceremony or permit it to be performed in his church. The practice as to granting marriage licences in the case of divorced persons varies in different dioceses.[1]

8. Although marriages duly solemnised in England according to English law between foreigners, or between a foreigner and a British subject, are valid throughout the British Empire, these marriages will not necessarily be valid in countries to which the foreigners belong, unless the legal requirements of these countries are complied with. Under arrangements made with France and Belgium, the French Consul and the Belgian Minister respectively will, on application, ascertain in any particular case that the legal requirements of their country have been complied with, and will furnish a certificate to that effect. No similar arrangement has as yet been made with any other foreign State. The following instructions have therefore been issued in the diocese of London, and may, with advantage, be observed elsewhere, namely:—(*a*) Where both parties to an intended marriage are foreigners, or one of them is a foreigner of

[1] As to marriage licences, see § 12 below.

any nationality except French or Belgian, or is a foreigner without a permanent residence in England, the marriage should in all cases be by licence, which will only be granted if the chancellor of the diocese is satisfied that the law of the country, to which the foreigners concerned belong, is complied with.[1] (*b*) Where a foreigner of French or Belgian nationality, whose permanent residence is in England, is a party to an intended marriage after banns with an English subject, the incumbent of the parish should require before solemnising it the production of a certificate from the French Consul or Belgian Minister, as the case may be, that all the legal requirements necessary to the recognition of the marriage as valid in France or Belgium have been complied with.

9. Marriages of persons within the prohibited degrees of kindred and affinity specified in the Table set forth by the authority of Archbishop Parker in the year 1563 are unlawful and void.[2] The degrees include illegitimate as well as legitimate relatives and connections; but an illegitimate *liaison* with a woman or a man does not make

[1] For an epitome of the foreign requirements for the validity of marriages in Europe and North and South America, see A Summary of Foreign Marriage Law, by Canon Glendinning Nash, 1903, published by the S.P.C.K., price 6d.

[2] (1540) 32 Hen. 8, c. 38; Canon 99; (1835) 5 & 6 Will. 4, c. 54. As to the Table, see Co. Litt. 235 a. n. (1); 2 Co. Inst. 683; Gibs. Cod. 411–415; 2 Burn, 439–50; Cardwell's Documentary Annals of the Church of England, vol. i. pp. 316–20 (no. lxiv); Sherwood v. Ray (1837) 1 Moo. P. C. 353, note on pp. 355–9.

her or him a wife or a husband within the meaning of the Table. Thus a man cannot marry his wife's illegitimate daughter or her half-sister, whether legitimate or illegitimate; but he can marry the daughter or sister of a woman with whom he has had unlawful connection.[1]

10. Under the Marriage Act, 1823, which slightly differs in language from Canon 62 and the rubrics in the Prayer Book, banns must be published on three Sundays (without an alternative of holy-days), and after the second lesson (instead of after the Nicene Creed) in morning service or in evening service if there is no morning service,[2] according to the form of words prescribed by the rubric. A slight deviation from this form will not invalidate the publication. A clergyman is not obliged to publish banns, unless the parties, at least seven days before the time required for the first publication, deliver or cause to be delivered to him a notice in writing bearing the date of the delivery, and setting forth their true Christian names and surnames, and the house or houses of their respective abodes within the parish or other district over which his authority as to banns and marriages extends, and the time during which they have respectively dwelt or lodged therein.[3] It is not imperative

[1] R. *v.* Brighton (1861) 1 B. & Sm. 447; Wing *v.* Taylor (1861) 2 Sw. & Tr. 278.

[2] 4 Geo. 4, c. 76, s. 2; Wynn *v.* Davies (1835) 1 Curt. 69, at p. 81.

[3] (1823) 4 Geo. 4, c. 76, s. 7.

upon him to require this seven days' notice, nor is he punishable for publishing the banns without it, or previously to its expiration. But he is liable to ecclesiastical censure if he dispenses with it, and, without due inquiry, publishes banns between persons not entitled to have their banns published, and then proceeds to marry such persons, even though his action was not knowing and wilful.[1] Where the parties dwell in different parishes or other definite districts for banns and marriages, the banns must be published in the church or chapel of both parishes or districts.[2] If one of the parties resides in Scotland, his or her banns may be published there according to Scottish law or custom, in contemplation of a marriage in England, after publication of the banns of the other party here.[3] And if one of the parties resides in England and the other in Ireland, the banns may be published in each country according to the law or custom prevailing there, although it may differ from the manner required in that part of the United Kingdom in which the marriage is to be solemnised.[4] A person dwells where he eats, drinks, and sleeps. He can only be said to dwell at the place where he temporarily sojourns if he

[1] Canon 62; (1823) 4 Geo. 4, c. 76, s. 21; Priestley *v.* Lamb (1801) 6 Ves. 421; Nicholson *v.* Squire (1809) 16 Ves. 259; Warter *v.* Yorke (1815) 19 Ves. 451; Wynn *v.* Davies (1835) 1 Curt. 69, at pp. 83, 84.

[2] (1823) 4 Geo. 4, c. 76, s. 2; (1837) 7 Will. 4 & 1 Vict. c. 22, s. 34; (1860) 23 & 24 Vict. c. 24.

[3] (1886) 49 & 50 Vict. c. 3.

[4] (1899) 62 & 63 Vict. c. 27

has no permanent abode. But he may dwell in more than one place, if he has a permanent abode in each.[1] The true Christian names and surnames, in which the banns are to be published, mean the full Christian name and surname of each party, and the omission of part of the Christian name, no less than the substitution of a wrong name, by the fraud of both parties, will render the marriage void. But where a party has abandoned his baptismal and family names and is known by repute by different names, his banns ought to be published in his acquired names; and publication in his original names, if intended to deceive, will be improper, and will invalidate the marriage.[2] There is no legal requirement that the status of the parties

[1] Macdougall *v.* Paterson (1851) 11 C. B. 755 ; 21 L. J. C. P. 27 ; Att.-Gen. *v.* McLean (1863) 1 H. & C. 750 ; Alexander *v.* Jones (1866) L. R. 1 Ex. 133 ; 35 L. J. Ex. 78.

[2] Tongue *v.* Allen (1835) 1 Curt. 38 ; (1836) 1 Moo. P. C. 90 ; Midgley *v.* Wood (1860) 30 L. J. P. M. & A. 57 ; R. *v.* Billingshurst (1814) 3 M. & S. 250. Where the woman was an illegitimate child, and had the banns published in the name of her mother, which she had never in fact borne, Sir John Dodson, in adjudging the marriage void, said that he had some doubt whether, in the case of an illegitimate child, the publication of the banns in the name of its mother, instead of the name of notoriety and repute, would necessarily be such an undue publication as would nullify the marriage. No doubt the name which a person under such circumstances had fully acquired was that in which the publication of banns should take place ; but there might be a case in which, without fraudulent intent, and from an innocent misapprehension of what was correct, the name of the mother might be used instead of that subsequently acquired ; Tooth *v.* Barrow (1854) 1 Eccl. & Adm. 371, at p. 374.

should be published, and the description of the woman as a widow, when she was, in fact, a spinster, is not an undue publication.[1] The banns must be published from a book and not from loose papers, and after publication must be signed by the officiating minister or some person under his direction.[2] If, in the case of a minor, a parent or guardian openly forbids the banns at the time of their publication by declaring or causing to be declared his or her dissent to the marriage, the publication will be void, and no marriage can be lawfully solemnised upon it.[3] No other forbidding of the banns will render the publication void. It can, at the utmost, only furnish a ground for caution and inquiry as to further proceeding with the matter.

11. On the production and delivery of a certificate of the superintendent registrar of births, deaths, and marriages of the district in which a church or chapel is situate, that due notice of an intended marriage in that church or chapel has been given, and also, if one of the parties resides in another district, of a similar certificate of the superintendent registrar of that district, the marriage may be solemnised in such church or chapel, with the consent of the minister thereof, but not otherwise, in like manner as after due publication of banns. But a superintendent registrar cannot

[1] Mayhew *v.* Mayhew (1812) 3 M. & S. 266.
[2] (1823) 4 Geo. 4, c. 76, s. 6. [3] *Ib.* s. 8.

grant a licence for a marriage in a church or chapel of the Church of England.[1]

12. A marriage may be solemnised, without banns or registrar's certificate, under a licence of the bishop of the diocese or the Archbishop of Canterbury for that purpose. A bishop's licence is granted by the chancellor of the diocese, through the diocesan registry, for the marriage of the parties in the church or chapelry of the parish in which one of the parties has dwelt for fifteen days immediately preceding. The licence, and also the form of affidavit leading to it, together with all information on the subject, can be obtained either direct from the diocesan registry or through a clergyman who is a chancellor's surrogate. Before it is issued, an affidavit must be made before a surrogate by one of the parties to the intended marriage that there is no legal impediment to it, and that one of the parties has for fifteen days immediately preceding the issue of the licence had his or her usual place of abode in the parish or other district for banns and marriages, in the church or chapel of which the marriage is to be solemnised.[2] An ordinary or special licence can also be granted by the Archbishop of Canterbury. His ordinary licence is issued under the

[1] (1836) 6 & 7 Will. 4, c. 85, ss. 1, 11, 15, 16; (1837) 7 Will. 4 & 1 Vict. c. 22, s. 36; (1856) 19 & 20 Vict. c. 119, s. 11.
[2] Canons 101–104; (1823) 4 Geo. 4, c. 76, s. 14.

same conditions and has the same effect as a bishop's licence. But his special licence may authorise the parties to be married in any church and at any time, irrespectively of their places of residence and of the canonical hours. On production of a licence for a marriage in a specified church, it is the duty of the incumbent to perform the ceremony, unless he knows that the licence has been fraudulently obtained; and it is not his business to ascertain that one of the parties has actually resided within the parish.[1] The requirement as to correctness of the names of the parties is not so strict in the case of a licence as in the case of banns; and the suppression in the affidavit leading to the licence of part of the name of one of the parties for the purpose of concealment has been held not to invalidate the marriage.[2] The grant of a marriage licence is a matter of favour and not of right.[3]

13. The marriage must be solemnised in the church or chapel, or one of the churches or chapels, in which the banns have been published, or in the church or chapel named in the registrar's certificate or in the marriage licence, within due time after the requisite preliminary formalities have been gone through. It should not be solemnised

[1] Tuckness *v.* Alexander (1863) 2 Dr. & Sm. 614; 32 L. J. Ch. 794.

[2] Bevan *v.* M'Mahon (1861) 30 L. J. P. M. & A. 61.

[3] Prince of Capua *v.* Count de Ludolf (1836) 30 L. J. P. M. & A. 71 (n.).

on the same day as the last publication of the banns; but if it does not take place within three months after the complete publication of banns or grant of the licence (as the case may be), it is not to be solemnised until after the banns have been duly republished on three Sundays, or a new licence has been duly obtained.[1] Similarly if a marriage intended to be sanctioned by a registrar's certificate does not take place within three calendar months after notice has been entered by the superintendent registrar, it is not to be solemnised until a new notice has been given and the entry duly made, and a certificate thereof given, as required by the Marriage Act, 1836.[2] Except under the authority of a special licence, it must be solemnised between the hours of eight in the forenoon and three in the afternoon, but the incumbent may appoint his own time for it within those hours.[3] It may be solemnised by either a priest or a deacon,[4] but a clergyman cannot solemnise his own marriage.[5] By canon and statute it must not take place in a private place, but in a church or chapel, and in time of Divine service, and before at least two witnesses. But the

[1] (1823) 4 Geo. 4, c. 76, ss. 9, 19. It is safest to construe this period as lunar months, *i.e.* twelve weeks; see 2 Bl. Comm. 141; Lacon *v.* Hooper (1795) 6 T. R. 224.

[2] 6 & 7 Will. 4, c. 85, s. 15.

[3] (1886) 49 & 50 Vict. c. 14; Canons of 1888.

[4] Wats. ch. xiv. p. 146; Reg. *v.* Millis (1844) 10 Cl. & F. 534, 859, 860.

[5] Beamish *v.* Beamish (1861) 9 H. L. C. 274.

canonical regulation as to marriages being solemnised during Divine service is now, by custom, universally disregarded; and even a marriage celebrated in the vestry of a church and in the presence of one witness only has been held to be valid, though such a precedent ought not to be followed.[1] A clergyman who knowingly and wilfully solemnises a marriage elsewhere than in a church or chapel where banns may be lawfully published, or at any other time than between eight in the forenoon and three in the afternoon (unless by special licence from the Archbishop of Canterbury), or without due publication of banns, unless under a marriage licence or on a registrar's certificate, is guilty of felony and punishable accordingly.[2]

14. On production of a certificate of marriage at a registry office, and payment of the customary fees (if any), a clergyman may, if he sees fit, read or celebrate the marriage service over the parties in his church; but this is not to invalidate the previous marriage, nor is the reading or celebration to be entered as a marriage in the parish register.[3] There have, however, been cases of a subsequent marriage in church, not only after a marriage before a registrar, but also after a marriage out

[1] Canon 62; (1823) 4 Geo. 4, c. 76, s. 28; Wing *v.* Taylor (1861) 2 Sw. & Tr. 278; 7 Jur. N. S. 737.
[2] (1823) 4 Geo. 4, c. 76, s. 21.
[3] (1856) 19 & 20 Vict. c. 119, s. 12.

of England, the wife's maiden name being used on the occasion.[1]

15. The right to fees for publication of banns, giving a certificate of banns where the marriage takes place in the other church in which they were published, and the marriage itself, can only depend in ancient parishes upon custom, presumed to date from time immemorial. A claim to a marriage fee of 13s. (10s. for the rector and 3s. for the clerk) was disallowed on the ground that the amount was unreasonably large and could not have been paid in the time of Richard I.[2] In new ecclesiastical parishes a claim for these fees can only be enforced if they have been set out in a table of fees settled by the Church Building Commissioners or their successors, the Ecclesiastical Commissioners, under the Church Building Act, 1819, or by the chancellor of the diocese under the new Parishes Acts, 1843 and 1856.[3]

16. Marriage register books in duplicate are furnished by the Registrar-General to the incumbent of every church or chapel in which marriages may be solemnised; and it is the duty of every clergyman who solemnises a marriage

[1] Phill. Eccl. Law. 629; Piers *v.* Piers (1849) 2 H. L. C. 331; 13 Jur. 569.

[2] Bryant *v.* Foot (1867) L. R. 2 Q. B. 161; aff. (1868) 3 *Ib.* 497.

[3] 59 Geo. 3, c. 134, s. 11; 6 & 7 Vict. c. 37, s. 15; 19 & 20 Vict. c. 104, ss. 14, 15.

to enter immediately afterwards in duplicate in two of the books the prescribed particulars of the marriage; and the entry is to be signed by him and by the parties married and by two witnesses. An incumbent is to allow searches in all marriage register books in his custody at a fee of 1s. for one year and 6d. for every additional year to which the search extends, and 2s. 6d. for a certificate (besides 1d. for the stamp). In every January and succeeding third month he must send in to the superintendent registrar of births, deaths, and marriages for the district, either directly or through a subordinate registrar, a certified copy of all the entries made by him since his last return, and will receive 6d. for every such entry. And whenever a register book is filled, he is to send one copy to the same registrar and keep the other copy with the registers of baptisms and burials of his parish or chapelry.[1]

17. If persons residing in the parish present themselves for Holy Communion as married, a clergyman has no right, (*a*) in the absence of any ground for suspicion to the contrary, to demand proof of their marriage before admitting them, or (*b*) to refuse to admit them on a mere suspicion that they are not married and therefore living in sin. If he refuses them Communion, he must be prepared to show either (*a*) that they actually

[1] (1836) 6 & 7 Will. 4. c. 86, ss. 30, 31, 33, 35, 40–44, sch. (C); (1837) 7 Will. 4 & 1 Vict. c. 22, ss. 25–29.

are not married, or (*b*) that he had good grounds for believing this to be the case. He is bound to recognise as man and wife persons who have been duly married according to the law affecting them at the time of the marriage, whether ecclesiastically or civilly, and whether in this country or elsewhere; provided that the law was Christian and monogamous; for a marriage according to a law, custom, or rite which contemplates polygamous unions is void in our law.[1] If there is any doubt as to the validity of their marriage, he will always be on the safe side in adopting the affirmative view and acting upon the assumption of their being validly married. In the absence of evidence to the contrary, the law will presume a valid marriage from the fact of long reputation and cohabitation as man and wife, without actual proof of the ceremony having taken place.[2] A marriage is legally valid if performed according to the mode and with the formalities required by the law of the place where it is solemnised.[3] But the capacity of the parties to contract marriage is governed by the law of their domicile; and therefore persons domiciled in this country between whom a marriage would be

[1] Hyde *v.* Hyde (1866) L. R. 1 P. & D. 130; *Re* Bethell (1888) 38 Ch. D. 220.

[2] Goodman *v.* Goodman (1859) 28 L. J. Ch. 745; The Breadalbane Case (1867) L. R. 1 H. L. Sc. 182; Geary, 140–142.

[3] Ruding *v.* Smith (1821) 2 Hag. Cons. 371, at pp. 390, 391.

illegal here, cannot contract a lawful marriage by going for the purpose into another country where such a marriage is legal, and there going through the ceremony.[1] Under the English common law a marriage between British subjects in a foreign country or on board ship, where no statute law binding upon them imposes any further formalities, is recognised as valid in this country if solemnised without banns or licence in the presence of a clergyman of the Church of England, whether priest or deacon (not being one of the parties to it).[2] A marriage between British subjects may also be solemnised outside the United Kingdom in accordance with the regulations of the Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), before a person authorised thereunder to act as a marriage officer, as it might have been before that Act under the Acts thereby repealed.

[1] Brook *v.* Brook (1861) 9 H. L. C. 193 ; 4 L. T. N. S. 93.
[2] Reg. *v.* Millis (1844) 10 Cl. & F. 534 ; 8 Jur. 917 ; Culling *v.* Culling (1896) P. 116.

CHAPTER VII

BURIAL

1. Every person dying in this country and not within the exceptions mentioned below (§ 3) has a common law right to be buried in the churchyard or burial ground of the parish in which he dies, by the clergyman of the parish.[1] Canon 67 prescribes that besides the passing bell (see Ch. VIII. § 1 below) there shall be rung after a person's death no more than one short peal, and one other before the burial and one other after the burial. If he dies out of his own parish, the persons who are responsible for his burial may claim that he be buried in his own parish.[2] If the clergyman or the persons having charge of the ground refuse interment, the ecclesiastical court is the proper tribunal to give relief, and it will compel the interment. The High Court would also compel it by mandamus.[3] But a parishioner has no right to be buried at a particular hour or (except in the

[1] Com. Dig. tit. Cemetery (B); Gilbert *v.* Buzzard (1821) 2 Hag. Cons. 333; R. *v.* Coleridge (1819) 2 B. & Ald. 806; R. *v.* Stewart (1840) 12 A. & E. 773, 777.

[2] Cripps, 759.

[3] Canon 68; Ex pte. Blackmore (1830) 1 B. & Ad. 122; R. *v.* Coleridge, *ubi sup.*

case of a private vault or a prescriptive right to a special spot) in a particular part of the churchyard. The incumbent can fix his own time for the funeral, and he and the churchwardens can exercise a discretion as to where each body shall be buried.[1] And neither incumbent nor churchwardens, nor both together, can make a valid sale or grant to individuals or families of a grave-space in the churchyard for their use in perpetuity. Any such attempted transaction is worthless in point of law. An exclusive right of burial in not more than one-sixth part of land given as an addition to a churchyard may be reserved by the donor to himself, his heirs, and assigns in perpetuity,[2] but with this exception no such exclusive right can be acquired in a spot within a churchyard except by faculty.[3] A person not a parishioner and not dying within the parish can only be buried in the parish churchyard, otherwise than in a

[1] Ex pte. Blackmore (1830) 1 B. & Ad. 122; Fryer *v.* Johnson (1755) 2 Wils. 28.

[2] (1867) 30 & 31 Vict. c. 133, ss. 9–11; (1868) 31 & 32 Vict. c. 47.

[3] The churchyard is not merely the property of a single departed generation, but is also the common property of the living and of generations yet unborn, and is subject only to temporary appropriations. An exclusive title to a portion of it is sometimes given by faculty to some family or individual possessing a good claim to be favoured by such a distinction. But even a bricked grave, in the absence of a faculty, is an aggression upon the common interests of the parishioners, and carries the pretensions of the dead to an extent which violates the rights of the living. Per Sir W. Scott (afterwards Lord Stowell), Gilbert *v.* Buzzard (1821) 2 Hag. Cons. 333, at p. 353.

private vault, by the favour and with the permission of the incumbent and churchwardens,[1] or under a faculty obtained from the Ecclesiastical Court.[2]

2. As regards the burial of bodies cast up on the shore of the sea or of any tidal or navigable water, the rights and duties are the same as if they were the bodies of parishioners of the parish in which they were cast up.[3]

3. Persons are excluded from a right to Christian burial who have not been baptized, or die excommunicate, or have committed suicide and been found *félo-de-se*.[4] Under the Interments (felo de se) Act, 1882,[5] the remains of a person on whom a verdict of *félo de se* has been passed are to be buried under the direction of the coroner in the ground in which they would be rightfully interred if there had been no such verdict, and in one of the ways prescribed or authorised by the Burial Laws Amendment Act, 1880.[6] A clergyman has no right to refuse interment with the full Burial Service to the child of a dissenter,[7] or a person who has only received lay baptism,[8] or has died

[1] Bardin *v.* Calcott (1789) 1 Hag. Cons. 14, 17 ; Littlewood *v.* Williams (1815) 6 Taun. 277 ; Sm. Churchw. 73.

[2] *Re* Sargent (1890) 15 P. D. 168.

[3] (1808) 48 Geo. 3, c. 75 ; (1886) 49 & 50 Vict. c. 20 ; Sm. Churchw. 73.

[4] Canon 68 and Prayer Book Rubric.

[5] 45 & 46 Vict. c. 19. [6] 43 & 44 Vict. c. 41.

[7] Kemp *v.* Wickes (1809) 3 Phill. 264.

[8] Mastin *v.* Escott (1841) 2 Curt. 692 ; aff. (1842) 4 Moo. P. C. 104 ; 6 Jur. 765.

in a state of intoxication.[1] But a refusal to bury is no offence if the clergyman has not received convenient warning of the intended interment.[2]

4. The incumbent may refuse to allow a corpse to be carried into church;[3] and, in the absence of a faculty or prescriptive right, the absolute discretion as to permitting or refusing burial under the church itself rests, in the case of an ancient parish church, with the rector, whether lay or spiritual, as regards the chancel, and with the incumbent as regards the rest of the church.[4] This discretion, for sanitary reasons, is now practically in abeyance. And no burial is permissible beneath a church built under the Church Building Acts or within twenty feet of its external walls.[5]

5. A clergyman cannot make the burial of a parishioner conditional on the payment of a fee.[6] And, in cases not provided for by some local or general statute or by a legally established table of fees, any subsequent right to recover a fee must depend on the immemorial custom of the particular parish.[7] But on the burial of non-parishioners

[1] Cooper *v.* Dodd (1850) 14 Jur. 724.

[2] Titchmarsh *v.* Chapman (1843) 7 Jur. 1020; (1844) 8 *Ib.* 626, 1077; (1845) 9 *Ib.* 159.

[3] 1 Burn, 267.

[4] Frances *v.* Ley (1615) Cro. Jac. 366. But the rector cannot grant the exclusive right to a vault; Bryan *v.* Whistler (1828) 8 B. & C. 288.

[5] (1818) 58 Geo. 3, c. 45, s. 80.

[6] Gilbert *v.* Buzzard (1821) 2 Hag. Cons. 333.

[7] Andrews *v.* Cawthorne (1745) Willes 536; Gibs. Cod. 453; Spry *v.* Marylebone (1839) 2 Curt. 5, 11; Spry *v.* Gallop (1847) 16 M. & W. 716; Bryant *v.* Foot (1868) 37 L. J. Q. B. 217.

special fees may be previously stipulated for;[1] and the churchwardens may by custom have a right to a portion of the fees for the benefit of the parish or the poor.[2] In the absence of such custom it is reasonable that part of these fees should go to the churchwardens for the benefit of the parish; since the burial of non-parishioners diminishes the space available for the interment of parishioners. Except where there is an ancient custom to that effect or under the provisions of the Burial or Cemetery Acts, no fee is payable to the incumbent of a parish in which a person dies who is buried in another parish.[3] The Church Building Act, 1819, enabled the Church Building Commissioners and their successors, the Ecclesiastical Commissioners, to fix a table of burial and other fees for a parish with the consent of the bishop and the vestry, and also for any extra parochial place or district chapelry or parochial chapelry,[4] but this power is not now usually exercised. The chancellor of the diocese is empowered and required to fix the fees for burials and other offices in the churchyards and churches of new parishes,[5] and, sitting as ordinary in the consistory court, he can prescribe the fees to be demanded in an ancient parish for any matter

[1] Nevill *v.* Bridger (1874) L. R. 9 Ex. 214 ; 43 L. J. Ex. 147.
[2] Littlewood *v.* Williams (1815) 6 Taun. 277 ; 1 Marsh. 589.
[3] Gibs. Cod. 452. [4] 59 Geo. 3, c. 134, s. 11.
[5] (1843) 6 & 7 Vict. c. 37, s. 15 ; see (1856) 19 & 20 Vict. c. 104, ss. 14, 15.

connected with burial which is in excess of the bare common law right of burial, as, for instance, for the privilege of being buried in a brick vault or in an iron coffin.[1] Where a new ecclesiastical parish is formed, and has a churchyard or burial ground, either of its own, or in which its residents have a right to be interred, whether provided ecclesiastically or by a burial authority, it becomes for the purposes of burial a distinct parish from the mother parish, so that the residents in each have no rights of burial in the churchyard or burial ground of the other, and the incumbent of the mother parish has no right to fees in respect of interments in the churchyard or burial ground of the new parish.[2]

6. A clergyman may use the Burial Service in unconsecrated ground,[3] and in cases where the Burial Service is not permissible, or where the persons responsible for the burial request it, he may use instead a special form prescribed or approved by the ordinary.[4] On receiving forty-eight hours' previous notice in writing to that effect from a relative, friend, or legal representative of a deceased person entitled to burial in a churchyard or burial ground, the incumbent of the parish or chaplain of the ground must permit the inter-

[1] Gilbert *v.* Buzzard (1821) 2 Hag. Cons. 333.

[2] Cronshaw *v.* Wigan Burial Board (1873) L. R. 8 Q. B 217 ; Hughes *v.* Lloyd (1888) 22 Q. B. D. 157.

[3] Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), s. 12.

[4] *Ib.* s. 13.

ment of the deceased without the performance of the rites of the Church of England, and either without any service at all or with some other Christian and orderly religious service conducted by a person or persons not in holy orders of the Church of England. The notice must state the proposed day and hour of the interment, which may be varied if inconvenient to the person receiving the notice; and he may, on stated grounds, object altogether to its taking place on a Sunday, Good Friday, or Christmas Day. On every such interment the incumbent or chaplain is entitled to the same fee, if any, as he would have received if it had been accompanied by the Burial Service.[1]

7. When a clergyman performs a funeral service, the certificate of the registrar of having registered or received notice of the death, or (where there has been a coroner's inquest) the order of the coroner authorising the burial, is to be delivered to him by the person who obtained it; and a clergyman who performs a funeral service without the delivery of such a certificate or order must, within seven days, give written notice of the fact to the registrar of births and deaths for the sub-district in which the death took place; and if he fails to do so, he is liable to a penalty not exceeding £10. In the case of a burial under the Act of 1880 (see § 6 above) the certificate or

[1] Burial Laws Amendment Act, 1880 (43 & 44 Vict. c. 41), ss. 1–8.

order is to be delivered to the relative or friend or legal representative of the deceased who has charge of or is responsible for the burial; and a similar obligation, under a similar penalty, lies on him of giving notice in case no certificate or order is delivered to him.[1]

8. In the case of interments in cemeteries established by special Acts which incorporate the Cemeteries Clauses Consolidation Act, 1847,[2] or contain similar provisions, the incumbent and clerk of the ecclesiastical parish from which any bodies are removed for burial are entitled to receive such fees as are prescribed by the special Act. They are to be accounted for and paid by the cemetery company half-yearly.[3]

9. Owing to the insufficiency of existing burial accommodation and the importance of closing churchyards in the centres of large towns, a series of Burial Acts, together with an Act known as the Public Health (Interments) Act, 1879,[4] have been passed from 1852 onwards, enabling burial boards and other local authorities to provide burial grounds. The Acts contemplate that parts of these grounds shall be consecrated and parts remain unconsecrated, and the earlier Acts con-

[1] (1874) 37 & 38 Vict. c. 88, ss. 17, 49; (1880) 43 & 44 Vict. c. 41, s. 11; (1881) 44 & 45 Vict. c. 2.

[2] 10 & 11 Vict. c. 65.

[3] *Ib.* sects. 52–57; Vaughan *v.* South Metropolitan Cemetery Co. (1860) 1 J. & H. 256; 30 L. J. Ch. 265; Bowyer *v.* Stantial (1878) 3 Ex. D. 315.

[4] 42 & 43 Vict. c. 31.

templated the erection of chapels on each of these parts. But questions having arisen as to the amount of discretion possessed by a local burial authority with regard to procuring the consecration of any and what portion of a burial ground acquired by them, an Act was passed in 1900 which, after authorising burial authorities to apply to the bishop for the consecration of any part of their burial ground approved by the Home Secretary, added that if a burial authority do not so apply within a reasonable time after being requested to apply, and the Home Secretary is satisfied that a reasonable number of persons within the burial district desire that a portion of the ground be consecrated, and that the consecration fees have been paid or reasonably secured, he may himself apply to the bishop for the consecration of an approved portion of the ground, and the bishop may consecrate it, and the burial authority will be bound to make the necessary arrangements for the consecration.[1] And with regard to chapels, burial authorities are empowered to erect at their own cost, on any part of their burial ground not consecrated or set apart for a particular denomination, a chapel for the joint common use of all denominations. They may also, at the request and cost of residents within the burial district of a particular denomination, erect and maintain a chapel for the funeral

[1] 63 & 64 Vict. c. 15 (Burial), s. 1.

services of that denomination on ground appropriated for their use. If a burial authority fail to do this within a reasonable time after the request has been made and the cost has been tendered or adequately secured, the Home Secretary may, if he thinks fit, order and compel the burial authority to erect and maintain the chapel or give facilities for its being done.[1] Where a burial ground has been provided by a local authority under the Burial Acts, the incumbents, clerks and sextons, of the ecclesiastical parishes for which the ground has been provided, had, in respect of the burial of inhabitants of those parishes in the consecrated part of the ground, the same right to fees as they had in the churchyard for which the ground is substituted, or would have had in that churchyard if it had been the parochial burying place for their respective parishes.[2] And the burial authority were empowered to sell rights of burial in vaults and permit the erection of monuments, with a reservation of such fees to the incumbent of each parish as he would have been entitled

[1] 63 & 64 Vict. c. 15 (Burial), s. 2.

[2] (1852) 15 & 16 Vict. c. 85, s. 32; (1857) 20 & 21 Vict. c. 81, s. 5; St. Margaret's Rochester Burial Board *v.* Thompson (1871) L. R. 6 C. P. 445; Gell *v.* Mayor of Birmingham (1864) 10 L. T. N. S. 497; Day *v.* Barnsley Burial Board (1865) 6 N. R. 156; Cronshaw *v.* Wigan Burial Board (1873) L. R. 8 Q. B. 217; 42 L. J. Q. B. 137; Ormerod *v.* Blackburn Burial Board (1873) 21 W. R. 539; White *v.* Norwood Burial Board (1885) 16 Q. B. D. 58; Stewart *v.* West Derby Burial Board (1886) 34 Ch. D. 314; Wood *v.* Headingley-cum-Burley Burial Board (1892) 1 Q. B. 713.

to in the old churchyard, or as might be fixed by the vestry of the parish with the approval of the bishop.[1] But the law as to fees in these burial grounds was considerably modified by the Burial Act, 1900. Under this Act (i.) burial authorities are to submit to the Home Secretary for his approval, either with or without modification, a table of fees to be received by them (of the same amount in the consecrated and unconsecrated parts of their burial ground) in respect of services rendered by any minister of religion or sexton; and if an authority fails to submit a table, the Home Secretary may himself make one. The fees are to be collected by and payable to the burial authority with their other fees, and are to be paid over to the minister or sexton in such manner as may be agreed upon, or as may be directed by the Home Secretary in default of agreement. (ii.) In the ground of a burial authority no fee in respect of any right of exclusive burial or the erection of a monument or any matter other than services rendered by the incumbent [2] is to be payable either to the incumbent or to the churchwardens, or any trustees or other persons to which fees were previously payable by law or custom for any parochial purpose or the discharge of any debt or liability, with the

[1] (1852) 15 & 16 Vict. c. 87, s. 33.

[2] This will include services rendered by a clergyman acting for the incumbent, as well as by the incumbent himself. See 15 & 16 Vict. c. 85, s. 32.

following exceptions, namely: (*a*) where on 10th July 1900 fees other than for services rendered were paid in a burial ground attached to or used for the purposes of a parish, the like fees are to continue payable during the incumbency of the then incumbent or during fifteen years from that date, whichever is the longer period, or if they were not paid to the incumbent or to a person claiming through him, then during fifteen years from that date; and the burial authority are to collect and pay them in like manner as fees for services rendered; and (*b*) the Ecclesiastical Commissioners may, at the request and with the approval of the incumbent or other interested person, agree with a burial authority for a periodical or other payment in commutation of the fees other than for services rendered; and where the fees are paid to an incumbent or a person claiming through him, the Ecclesiastical Commissioners are to apply the commutation money in the first instance in compensating the existing incumbent, and the residue in augmenting the benefice. (iii.) No fee other than fees payable to a sexton for services rendered by him, is to be paid to any clerk or other ecclesiastical officer in respect of interments in the ground of a burial authority; except that a clerk or other ecclesiastical officer who, on 10th July 1900, was entitled to fees in respect of interments in any such ground, might apply to the burial authority for compensation for their aboli-

tion, and they were to pay him such equitable amount of compensation as might be agreed upon or be directed by the Home Secretary in default of agreement. (iv.) The foregoing provisions extend to cases where an annual sum had been substituted for fees under 15 & 16 Vict. c. 85, s. 37.[1]

10. A body may be cremated instead of being buried;[2] and a faculty has been granted for the interment of an urn containing the ashes of a cremated body below the floor of a church, in spite of the church and churchyard having been closed for burials under the Burial Acts.[3] And there is no reason why, upon the committal of cremated ashes to consecrated ground, the Burial Service should not be used as fully as over an uncremated body. But the disinterment, for the sake of being cremated, of a body which has been once buried is not permitted.[4]

11. A body which has been buried in consecrated ground cannot be disinterred for reinterment elsewhere in consecrated ground, except under the authority of a faculty, which will be granted in proper cases upon the petition of the representatives of the deceased, with the consent of the incumbent and churchwardens and a certificate of the local medical officer of health

[1] 63 & 64 Vict. c. 15, s. 3.
[2] Reg. *v.* Price (1884) 12 Q. B. D. 247.
[3] *Re* Kerr (1894) P. 284. [4] *Re* Dixon (1892) P. 386.

that the proceeding will not be dangerous from a sanitary point of view.[1] And except in the case of removal from one consecrated spot for reinterment in another, a body, or the remains of a body, which has been interred in any place of burial may not be removed without the licence of the Home Secretary and with such precautions as he may prescribe.[2]

[1] Gibs. Cod. 454; Reg. *v.* Sharpe (1857) 26 L. J. M. C. 47.
[2] (1857) 20 & 21 Vict. c. 81 (Burial), s. 25.

CHAPTER VIII

PRIVATE MINISTRATIONS

1. The only private ministration for which detailed directions are provided in the Prayer Book (other than Private Baptism, which has been already noticed in Ch. V. § 6) is the Visitation of the Sick with the Communion of the Sick in appropriate cases. With reference to this the 67th Canon directs that when any person is dangerously sick in the parish, the minister or curate having knowledge thereof shall resort to the sick person (if the disease is not known or reasonably suspected to be infectious) to administer instruction and comfort according to the order of the Communion Book if he be no preacher; or if he be a preacher, then as he shall think most needful and convenient. And when any one is passing out of this life a bell is to be tolled, and the minister shall not then be slack to do his duty. The Order for the Visitation contains several alternative forms to suit different circumstances. Among these is the provision for confession and absolution. The minister is in all cases to examine the sick person whether he

repent him truly of his sins and be in charity with all the world, and is to exhort him to forgive from the bottom of his heart all who have offended him. This direction does not contemplate any confession either particular or general, except so far as profession of repentance involves admission of sins to be repented of. But the minister is further to move the sick person to make a special confession of his sins if he feel his conscience troubled with any weighty matter; and after this confession, if he humbly and heartily desires it, the priest is to pronounce a prescribed form of absolution. It appears, therefore, that confession is only contemplated if the sick person's conscience is troubled with some weighty matter, and absolution is only to be pronounced if (*a*) there has been confession, and (*b*) the sick person desires it. Communion of the sick may take place either along with or apart from the visitation. In either case there must be three, or at least two, in addition to the minister, to communicate with him, except in time of plague or similar contagious illness, when the minister may communicate with the sick person alone. In every case he must receive the Communion himself first, and then administer to the sick person's friends, and to the sick person last. After a special Collect, Epistle, and Gospel, the Order of Holy Communion is to be followed from the words "Ye that do truly and earnestly repent you of your sins" onwards.

The Church of England at present permits no administration of any reserved Sacrament to the sick nor any further abbreviation of the service.[1] If the sick person is too ill to receive the Communion in the prescribed way, or is otherwise impeded, he is to be instructed that, without doing so with his mouth, he eats and drinks the Body and Blood of Christ to his soul's health if he truly repents of his sins, and steadfastly and thankfully believes in the redemption wrought by Christ's death on the Cross for him.

2. The Prayer Book requires the incumbent of every parish to bring or certify in writing to the bishop all persons within the parish whom he thinks fit to be presented to the bishop for confirmation. No special mode of preparation for that rite is prescribed beyond public in-

[1] Archbishops' Hearing at Lambeth (1900) *Times*, May 2. The Prayer Book of 1549 directed that if on the same day there was a celebration in church, the priest should reserve (at the open Communion) so much of the Sacrament of the body and blood as should serve the sick person and so many, if any, as should communicate with him, and so soon as convenient after the open Communion should go and minister the same first to any appointed to communicate with the sick person, and last of all to the sick person himself, after having previously made the general confession and added the absolution and the comfortable words of Scripture as in the Communion Office; and after the administration he was to say the Collect "Almighty and everliving God, we most heartily thank," &c. But if the day were not appointed for the open Communion, then the curate should come and visit the sick person afore noon and celebrate the Holy Communion according to the Order for the Communion of the Sick. But these directions were omitted in 1552, and have not since been restored.

struction in the Catechism (see above, Ch. V. § 9). But this *minimum* is rightly in the present day not considered sufficient. Special confirmation classes and private interviews with intending confirmees are now almost universal, and form one of the most responsible and important parts of the pastoral duties of the clergy.

3. Besides the ordinary occasions of Confirmation and Sickness, the minister may be called upon to give spiritual advice or comfort to persons whom he knows to be living evil lives or to be at enmity with their neighbours, or who are troubled in conscience about coming to Holy Communion, or generally about their spiritual state. In the first Prayer Book of Edward VI. the Exhortation to be said in giving previous notice of Holy Communion where the people were negligent in coming to it, contained injunctions to reconciliation and charity among neighbours and restitution of wrongs, without which "neither the absolution of the priest can anything avail them nor the receiving of this holy sacrament doth anything but increase their damnation." And it then referred to confession and absolution in these terms:—

"And if there be any of you whose conscience is troubled and grieved in anything lacking comfort or counsel, let him come to me or to some other discreet and learned priest taught in the law of God, and confess and open his sin and grief secretly, that he may receive such

ghostly counsel, advice, and comfort that his conscience may be relieved, and that of us (as of the ministers of God and of the Church) he may receive comfort and absolution to the satisfaction of his mind and avoiding of all scruple and doubtfulness: requiring such as shall be satisfied with a general confession not to be offended with them that do use, to their further satisfying, the auricular and secret confession to the priest; nor those also which think needful or convenient, for the quietness of their own consciences, particularly to open their sins to the priest, to be offended with them that are satisfied with their humble confession to God and the general confession to the Church: but in all things to follow and keep the rule of charity, and every man to be satisfied with his own conscience, not judging other men's minds or consciences where as he hath no warrant of God's word to the same."

In the present Prayer Book, all allusion to "auricular" confession is omitted. The minister simply exhorts that if any person cannot by his own confession to God, with full purpose of amendment of life and by reconciliation with any neighbours whom he may have offended, quiet his own conscience with a view to receiving Holy Communion, he should come to the incumbent of the parish, or to some other discreet and learned minister of God's word, and open his grief, "that by the ministry of God's holy word he may receive the benefit of absolution together with ghostly counsel and advice to the quieting of his conscience and avoiding of all scruple and doubtfulness." The procedure is clearly contemplated as excep-

tional, as respects (*a*) the persons who have recourse to it, (*b*) the occasions on which they do so, and (*c*) the sins or stumbling-blocks on which they consult the minister.

4. In addition to these more formal ministrations, a diligent clergyman will pay frequent visits to his parishioners, and hold interviews or correspondence with them on any questions of intellectual perplexity or of practical difficulty in their daily life in reference to which they may desire his counsel or assistance; but his action in these matters is not regulated by law, and lies outside the scope of the present treatise.

CHAPTER IX

TEMPORALITIES

1. The legal possessions and revenues of the benefice of an ancient parish consist of (i.) the church and churchyard (subject to the use of both for the benefit of the people), (ii.) the parsonage house and glebe lands and buildings, (iii.) the tithe, (iv.) any modern endowments, including perpetual annuities granted by the Ecclesiastical Commissioners, (v.) ordinary dues and offerings, (vi.) mortuaries, and (vii.) fees; and some of these possessions and revenues are also attached to the benefice of a new ecclesiastical parish, which has, moreover, in certain cases a further source of revenue in (viii.) pew-rents.

2. The incumbent for the time being, whether of an ancient or new parish, has a freehold interest for his life, if he so long remains incumbent, in the possessions of the benefice, and for the purpose of holding them is a corporation sole, with a continuous succession in himself and all future incumbents. As such, he is subject to the general laws respecting corporations, and also to those which regulate the acquisition and holding

of landed property for charitable purposes, except so far as the law has made special exemptions in his favour. Accordingly, except to the extent expressly permitted by statute, he cannot in his corporate capacity, with perpetual devolution to his successors in office, (*a*) acquire or hold additional landed property without a licence in mortmain or in a manner inconsistent with the provisions of the Mortmain and Charitable Uses Acts, 1888 and 1891,[1] or (*b*) hold landed property upon any trust or for any purpose other than as part of the possessions of the benefice.[2]

3. The rights of an incumbent in the church and churchyard differ according as the benefice

[1] 51 & 52 Vict. c. 42 ; 54 & 55 Vict. c. 73.

[2] Under the School Sites Acts, 1841, 1844 and 1851 (4 & 5 Vict. c. 38, 7 & 8 Vict. c. 37, 14 & 15 Vict. c. 24), land may under certain restrictions be conveyed to the minister and churchwardens and overseers of the poor, or to the ministers and churchwardens, of a parish, for the purpose of the education of the poor, and when so conveyed will remain vested in them and their successors as if they were a corporate body; but, except where authorised by a special local Act, it cannot be conveyed to the incumbent and churchwardens, or to the churchwardens alone, in perpetuity for any other purpose. (In the City of London, however, churchwardens can, by custom, acquire and hold land as a corporation for ecclesiastical or parochial purposes.) The Bodies Corporate (Joint Tenancy) Act, 1899 (62 & 63 Vict. c. 20), does not give any further power to an incumbent to hold property as a corporation jointly with another corporation or with individuals upon any ecclesiastical or charitable trusts ; since the holding authorised by the Act is to be subject to the same conditions and restrictions as attach to its holding by a body corporate in severalty ; and an incumbent as above mentioned could not, without a licence in mortmain, hold as a corporation by himself any property upon similar trusts, unless empowered to do so by express statutory authority.

is an ancient or a new parish, and in the former case according as it is a rectory or a vicarage. The freehold of the whole church in an ancient parish (except where a chapel or aisle or a pew belongs to a private individual), and of the churchyard, belongs to the rector, whether he be the incumbent or not;[1] and the chancel is repairable by him, except where there is a custom for the parishioners to keep it in repair. His duty in this respect can be enforced by suit in the ecclesiastical court, and the churchwardens cannot safely repair the chancel themselves and then sue him for the cost.[2] But the incumbent and churchwardens (subject to the rights of the bishop) have the possession and custody of the whole church, including the chancel, and a lay rector cannot interfere with their proper use of it; nor can any person claim to enter it, when not open for Divine service, without their permission.[3] And the incumbent has the paramount right to keep the keys of the church and to control the use of the organ and the ringing of the bells.[4] But ringers are not liable to criminal proceedings in the ecclesiastical court for ringing

[1] Jones *v.* Ellis (1828) 2 Yo. & Jer. 265, 266, 273; Batten *v.* Gedye (1889) 41 Ch. D. 507.

[2] Morley *v.* Leacroft (1896) P. 92; Neville *v.* Kirby (1898) P. 160.

[3] Jarratt *v.* Steele (1820) 3 Phill. 167; Jones *v.* Ellis *ubi sup.*; Griffin *v.* Dighton (1864) 5 B. & Sm. 93, aff. 108; 33 L. J. Q. B. 29, aff. 181.

[4] Harrison *v.* Forbes (1860) 6 Jur. N. S. 1353; Redhead *v.* Wait (1862) 6 L. T. N. S. 580.

the church bells without his consent, unless it was done against his express desire.[1] Moreover, Canon 88 contemplates that the churchwardens and sidesmen should have some control over the bellringing; for it enjoins upon them not to allow the bells to be rung superstitiously upon holy-days or eves abrogated by the Prayer Book, nor at any other times without good cause to be allowed by the incumbent and by themselves. And as regards the churchyard, unless there is a special provision to the contrary in connection with his endowment, a vicar, as against the rector impropriate, is only entitled to the possession of the churchyard for spiritual purposes. The rector has a right to the profits of the soil, and he or his tenants can depasture it with sheep.[2] But a rector is only at liberty to fell the trees in the churchyard when they are required for the repair of the chancel, or when the body of the church requires repair and he voluntarily allows the parishioners to use them for the purpose.[3] In new parishes the freehold of the church and churchyard and of the vaults belonging thereto is vested in the incumbent, except where it has been vested in the vestry under a local Act and they have not consented

[1] Daunt *v.* Crocker (1867) L. R. 2 A. & E. 41; 37 L. J. Eccl. 1.

[2] Greenslade *v.* Darby (1868) L. R. 3 Q. B. 421; 9 B. & Sm. 428.

[3] Stat. (*temp incert.*) *Ne rector prosternat arbores in cemiterio.*

to part with it.[1] Neither incumbents nor rectors impropriate are liable in respect of the church and churchyard to rates, nor to contributions towards the expense of making and paving new streets.[2] So, too, an incumbent was held not liable as owner for expenses incurred by a local authority under a statute in removing a part of the church which had become a dangerous structure.[3]

4. The rights of the incumbent are, moreover, qualified and controlled by the rights of the bishop on the one hand and of the parishioners on the other. He has a general authority from the bishop to decide as to allowing or disallowing the erection in the churchyard of tombstones with inscriptions, not being of an unusual character in respect of size or otherwise, as well as glass shades for wreaths and other additions to the contents of the churchyard.[4] But any person interested may appeal against his decision to the bishop's court, which has power to determine the matter, subject to appeal to the higher tribunals.[5] He cannot, however, authorise the

[1] (1856) 19 & 20 Vict. c. 104, s. 10.

[2] (1833) 3 & 4 Will. 4, c. 30; Angell *v.* Paddington Vestry (1868) 9 B. & Sm. 496; L. R. 3 Q. B. 714.

[3] Reg. *v.* Lee (1878) 4 Q. B. D. 75.

[4] M'Gough *v.* Lancaster Burial Board (1888) 21 Q. B. D. 321; 52 J. P. 740.

[5] Keet *v.* Smith (1875) L. R. 4 A. & E. 398; rev. (1876) 1 P. D. 73. The bishop himself decides disputes as to monumental inscriptions on stones in the consecrated portion of a burial ground provided under the Burial Acts; (1852) 15 & 16 Vict. c. 85, s. 38. As to the consecrated parts of cemeteries established by companies under the Cemeteries Clauses Act, 1847, see 10 & 11 Vict. c. 65, s. 51.

erection of monuments or tablets in the church itself, nor monuments of abnormal size in the churchyard. These, as well as other additions to or alterations in the church or churchyard, require the sanction of a faculty either from the bishop's consistory court or, if there refused, from the provincial court or the Judicial Committee of the Privy Council. A faculty for the purpose will, in proper cases, be granted on the application of the incumbent and churchwardens supported by a resolution of the vestry.[1] If there is a rector impropriate, his consent will be necessary to any proposed change in the chancel. As already noticed (Ch. VII. § 1 above), the incumbent cannot validly, on his own authority, sell grave spaces in perpetuity in the churchyard; and a faculty will not be granted for a vault or space for exclusive burial unless it is clearly improbable

[1] Sm. Churchw. 52–57. A faculty is not necessary for mere repairs or redecoration where no alteration is made in the structure or the design, nor for trifling additions such as movable seats or hassocks. But a change in the mode of lighting or heating the church ought to be sanctioned by faculty. The grant of a faculty, besides ensuring that all is done legally and carefully, prevents any ill-feeling being cherished in the parish on the score of the alteration having been made without the knowledge or consent of some of the parishioners; since the application for the faculty affords to all who are interested in the matter an opportunity for submitting their views upon it. The regular mode of obtaining the approval of the parishioners to it is by a resolution of the vestry. But the opinion of the vestry is not conclusive; and a distinction will sometimes be made between the votes of those members of the vestry who are Church people and those who are not; see note (3) on p. 89 above.

that it will inconveniently diminish the available ground for the burial of the parishioners.[1] It is an offence on the part of any one to remove earth and bones from the churchyard[2] or to desecrate it in any other way; but a faculty will in a proper case be granted for diverting the course of an ancient footpath through a churchyard when necessary for the enlargement of the church;[3] and for throwing a portion of a churchyard, which is not required for interments, into a highway.[4] A wall of a churchyard which has been wilfully pulled down does not require a faculty for its restoration.[5] A faculty has been granted to secure for ninety-nine years an easement of light and air to the lower windows of an adjoining house through the railings of a churchyard, on payment of an annual rent of £22 to the rector for the time being.[6] Where a churchyard or other burial ground has been closed or is no longer used for burials, a faculty may be obtained for laying it out as a garden with footpaths, and removing the tomb-

[1] Rosher *v.* Vicar of Northfleet (1825) 3 Add. 14; Pitcher *v.* The Same (1825) *Ib.* 15.

[2] Adlam *v.* Colthurst (1867) 36 L. J. Eccl. 14.

[3] Vicar of Tottenham *v.* Venn (1874) L. R. 4 A. & E. 221, 225.

[4] *Re* Bideford Parish (1900) P. 314.

[5] Rector of St. Stephen's, Wallbrook *v.* Sun Fire Office Trustees (1883) Trist. Cons. Judgm. 103.

[6] *Re* St. Martin's Orgars (1870) *Ib.* 145. Comp. Rector of St. Stephen's, Wallbrook *v.* Sun Fire Office Trustees, *ubi sup.*

stones and placing them against the walls of the church or churchyard;[1] but the erection upon it of any building, except for the purpose of enlarging a church, chapel, or other place of worship, is unlawful, and no faculty can be granted for it.[2]

5. Every ancient church ought of right to have glebe as well as a manse or parsonage house attached to it.[3] In a parish where there is an impropriate rectory and a vicarage, glebe may be attached to both or either. Rectorial glebe is not liable to pay vicarial tithe to the vicar, nor is vicarial glebe liable to rectorial tithe to the rector.[4] Since the interest of the incumbent in the house of residence and glebe is limited to his life or tenure of the benefice, he cannot deal with them in a way prejudicial to the rights of the patron or of his successors in the incumbency. His powers of selling, exchanging, and leasing are strictly defined by statute. He must not commit what is technically called "waste"—that is to say, any spoiling or destruction of houses, gardens, or other glebe of the benefice, or of the trees thereon, to the detriment of his successors. In cultivating the glebe lands himself, he is not restricted to any particular mode of cultivation, nor accountable to his

[1] *Re* St. George in the East (1876) 1 P. D. 311.
[2] (1884) 47 & 48 Vict. c. 72; (1887) 50 & 51 Vict. c. 32, s. 4.
[3] Com. Dig. tit. "Dismes" (B. 2). [4] 2 Burn, 302.

successors for neglect or mismanagement.[1] But he must not cut down trees, except so far as they may be required for the repairs of the buildings of the benefice, including the chancel of the church, if he is the rector and is liable to repair it.[2] He may not on his own account open mines, quarries, or gravel-pits under or upon the glebe land, nor work those which have been unlawfully opened; but he may work those which are already lawfully open;[3] and even as regards minerals or gravel unlawfully taken by him, if he is not restrained at the time, his successor cannot maintain an action for damage against his representatives after his death.[4]

6. In modern times the provision of parsonage houses and of other necessary buildings on glebe lands, and the repairs of chancels liable to be repaired by rectors, have been facilitated by special legislation. In 1777 and 1781 the Gilbert Acts were passed,[5] which, as amended by Acts of 1826 and 1838,[6] enabled an incumbent, with the consent of the bishop and patron, or, during a vacancy

[1] Bird *v.* Relph (1833) 4 B. & Ad. 826.

[2] Degge, ch. viii.; Sowerby *v.* Fryer (1869) L. R. 8 Eq. 417. The right to cut timber for the purpose of repairs includes the right to sell timber at a distance from the site of the repairs and buy other timber with the proceeds of the sale; Wither *v.* Dean of Winchester (1817) 3 Mer. 421.

[3] Holden *v.* Weekes (1860) 1 J. & H. 278; Ecclesiastical Commissioners *v.* Wodehouse (1895) 1 Ch. 552.

[4] Ross *v.* Adcock (1868) L. R. 3 C. P. 655.

[5] 17 Geo. 3, c. 53; 21 Geo. 3, c. 66.

[6] 7 Geo. 4, c. 66; 1 & 2 Vict. c. 23; 1 & 2 Vict. c. 106, s. 62.

in the living, the bishop, to borrow money for the purpose of providing a parsonage house, or rebuilding it in case of its having become ruinous, upon the security of a mortgage of the income of the benefice for thirty-five years. The loan was not to exceed the amount of the gross net income of the benefice, and was to be repayable with interest by thirty yearly instalments. The Governors of Queen Anne's Bounty were empowered to lend money for the purposes of the Acts; and, in practice, the loans are generally obtained from them. A later statute[1] extended these provisions to the purchase of land convenient to be used with the parsonage house or existing glebe land, and to the repair of the chancel in cases where it is repairable by the incumbent, and to the building or improving of farm houses or buildings or labourers' dwelling-houses on the glebe land; and subsequent Acts have extended the time for repayment of the loans.[2] Another series of enactments has specially sanctioned gifts and bequests for providing parsonage houses and glebe;[3] and under a

[1] (1865) 28 & 29 Vict. c. 69.

[2] (1881) 44 & 45 Vict. c. 25; (1887) 50 & 51 Vict. c. 8; (1896) 59 & 60 Vict. c. 13.

[3] (1777) 17 Geo. 3. c. 53, s. 21; (1803) 43 Geo. 3, c. 108; (1811) 51 Geo. 3, c. 115; (1815) 55 Geo. 3, c. 147, s. 5; (1856) 19 & 20 Vict. c. 104, s. 27; (1865) 28 & 29 Vict. c. 69, s. 4. As to the consent of the Board of Agriculture being requisite to a grant of common land, see (1899) 62 & 63 Vict. c. 30, s. 22.

third series incumbents are empowered to sell the parsonage houses and glebe lands of benefices, or exchange them for others of greater value or more conveniently situated, and to acquire new parsonage houses and additional glebe lands.[1]

7. When an incumbent has a licence from the bishop to reside elsewhere than in the parsonage house, he may let the house, subject to an obligation on the part of the tenant to give up possession on the bishop ordering the incumbent to resume residence therein.[2]

8. An incumbent may either himself farm his glebe (see Ch. I. § 16 above) or let it to tenants. The tenants, however, will have no rights against his successors unless the leases to them are made in accordance with the statutory provisions for the purpose. These provisions enable an incumbent, subject to certain restrictions and with the consent of the bishop and patron, to let the glebe on farming leases for fourteen years or, in some cases, for twenty years,[3] and under special con-

[1] (1815) 55 Geo. 3, c. 147; (1816) 56 Geo. 3, c. 52; (1820) 1 Geo. 4, c. 6; (1825) 6 Geo. 4, c. 8; (1826) 7 Geo. 4, c. 66; (1838) 1 & 2 Vict. c. 23; c. 29; (1839) 2 & 3 Vict. c. 49; (1842) 5 & 6 Vict. c. 54; (1846) 9 & 10 Vict. c. 73, s. 22; (1858) 21 & 22 Vict. c. 57; (1860) 23 & 24 Vict. c. 93, s. 41; (1861) 24 & 25 Vict. c. 105, s. 3; (1865) 28 & 29 Vict. c. 57; (1888) 51 & 52 Vict. c. 20. See also The Sale of Glebe Land Rules 1897 (Weekly Notes (1897) p. 117); Ecclesiastical Commissioners *v.* Pinney (1899) 1 Ch. 99; 2 Ch. 729; aff. (1900) 2 Ch. 737.

[2] (1838) 1 & 2 Vict. c. 106, ss. 59, 60.

[3] (1842) 5 & 6 Vict. c. 27.

ditions to grant leases of it for longer periods for building and mining purposes.[1]

9. An incumbent, as having an interest in the parsonage house and other buildings of the benefice only during his incumbency, was always bound to keep them in repair for the benefit of his successors.[2] His exact liability in this respect and also in respect of insuring against fire is now regulated by the Ecclesiastical Dilapidations Act, 1871.[3]

10. Under this Act diocesan surveyors are appointed in every diocese to inspect and report as to requisite repairs and to certify as to their due execution. The proceedings vary according as they take place (*a*) upon a vacancy in the benefice, or (*b*) at other times. But in either case, after they have taken place, a certificate of the diocesan surveyor that the requisite works have been completed in the parsonage house and other buildings (including walls and fences, and, in the case of a rector liable for its repair, the chancel of the church) will (in

[1] (1842) 5 & 6 Vict. c. 108; (1858) 21 & 22 Vict. c. 57; (1861) 24 & 25 Vict. c. 105; Ecclesiastical Commissioners *v.* Wodehouse (1895) 1 Ch. 552.

[2] Wise *v.* Metcalfe (1829) 10 B. & C. 299; Martin *v.* Roe (1857) 7 E. & B. 237.

[3] 34 & 35 Vict. c. 43. The Act is amended so far as respects the rates of fees thereunder by (1872) 35 & 36 Vict. c. 96; and so far as respects mortgages for loans, by that Act and (1896) 59 & 60 Vict. c. 13 and the intermediate Acts specified in the schedule thereto, and, in the case of extraordinary tithe redemption, by (1886) 49 & 50 Vict. c. 54, s. 12.

the absence of wilful waste or of loss or damage by fire where the incumbent has not kept up a sufficient fire insurance) confer exemption from liability for dilapidations, in respect of those buildings, for the next five years.

11. (*a*) Within three months after a benefice has become vacant,[1] unless the late incumbent was for the time being free, in respect of all the buildings of the benefice, from liability to dilapidations, the diocesan surveyor will inspect the buildings or such of them as have not been included in the exempting certificate, and will report to the bishop what works and what sum, if any, are required for making good the dilapidations. Either the new incumbent, or the late incumbent or his executors or administrators, may send to the bishop objections to the report, and the bishop will make an order specifying the repairs to which the late incumbent or his estate is liable and the cost of them. The amount of the cost thereupon becomes a debt from the late incumbent or his estate to the new incumbent and may be recovered as such.[2]

[1] The time is not essential, Caldow *v.* Pixell (1877) 2 C. P. D. 562.

[2] *Re* Monk: Wayman *v.* Monk (1887) 35 Ch. D. 538. Consequently if on an incumbent's death the benefice is under sequestration, the sequestrator is not liable for the dilapidations; Jones *v.* Dangerfield (1875) 1 Ch. 438. On an exchange, the claim for dilapidations may be waived on both sides, with a view to their falling, in the case of each benefice, on the incoming instead of on the outgoing incumbent; Wright *v.* Davies (1876) 1 C. P. D. 638.

Any money received in respect of it is to be paid to the Governors of Queen Anne's Bounty, and they, with the consent of the bishop and patron, may lend on the security of the possessions of the benefice, any part of the cost which they have not received from the new incumbent. Any additional balance required to make up the total amount of the cost of the repairs must be paid to them by the new incumbent, and in case of non-payment may be raised by sequestration of the profits of the benefice. All the sums received or lent by them are to be placed in the first instance to a dilapidation account. If a vacancy occurs in a benefice between the time of an inspection of the buildings and the certifying of the completion of the works, the former incumbent or his estate will be liable for any portion of the cost of the required repairs remaining unpaid by him, as a debt due to the new incumbent. But the new incumbent, whether he recovers that portion or not, will be under the same liability to pay for the outstanding cost of the repairs as the former incumbent would have been had he continued to hold the benefice; and any amount which he fails to recover from the former incumbent or his estate may with the consent of the bishop and patron be lent to him by the Governors of Queen Anne's Bounty on the security of the profits of the benefice.

12. (*b*) On a written complaint of the archdeacon, the rural dean, or the patron, that the build-

ings of a benefice are dilapidated, or at the request of the incumbent himself, the bishop, although no vacancy has occurred, may direct the diocesan surveyor to inspect the buildings, unless, in the case of a complaint on the subject, the incumbent is himself ready to put the buildings in proper repair, and the bishop is satisfied that this is actually done. Such inspection may also be directed within six months after the sequestration of a benefice, and is to be renewed in every fifth year while the sequestration continues. The surveyor, in like manner as in the case of a vacancy, will report to the bishop the works needed and their probable cost. The incumbent or the sequestrator may state objections to the report, and the bishop will give his decision in writing. If the benefice is not under sequestration, the Governors of Queen Anne's Bounty may, with the consent of the bishop and patron, lend on the security of the possessions of the benefice the whole or any part of the cost of the required works. The amount of the loan will be placed to a Dilapidation Account, and it will be the duty of the incumbent to execute the required works in the prescribed manner. If he fails to do so, the cost may be raised by sequestration of the benefice, and the same course will be taken as if that had occurred before the dilapidation proceedings had commenced. In the case of a benefice under sequestration, the cost of the

required works is to be a charge on the income of the benefice which comes into the hands of the sequestrator, and out of that income, after providing for the performance of the duties of the benefice, he is to pay the amount of the cost to the Governors of Queen Anne's Bounty, to be placed by them to a dilapidation account. The proceedings are not to be affected by any vacancy occurring in the benefice before the works are executed, except so far as modification may be made in them as the result of the report of the surveyor after his inspection consequent on the vacancy, and except that if the benefice was under sequestration, any unexpended amount standing to the dilapidation account of the sequestrator is to be carried to the dilapidation account of the new incumbent in reduction of the amount payable by the former incumbent or his estate. A sequestrator who spends more on the repairs than is authorised by the surveyor's report is personally liable for the excess.[1]

13. When the surveyor certifies from time to time, until the whole of the repairs have been executed, that a certain sum ought to be paid in respect of the required works, such sum is payable out of the money standing to the dilapidation account, and when all this money is exhausted, must be paid by the incumbent himself. It is his duty to cause the repairs to be executed,

[1] Kimber *v.* Paravicini (1885) 15 Q. B. D. 222.

unless with the consent of the bishop and patron he decides to rebuild or to alter or remodel any structure. In that case, if the repairs are superseded or rendered unnecessary, the money standing to the dilapidation account may be applied towards the cost of the new work.

14. It is the duty of an incumbent to keep the parsonage house and other buildings of the benefice (including the chancel of the church in the case of a rector liable for its repairs) insured against loss or damage by fire to the satisfaction of the Governors of Queen Anne's Bounty, in the joint names of the incumbent and themselves, in at least three-fifths of the value of the buildings; and the receipt for the current year's premium in respect of the insurance must be exhibited at the next visitation of the bishop or archdeacon. The money received in respect of any destruction or damage of a building which the insurance office does not cause to be reinstated at its own expense, is to be paid to Queen Anne's Bounty, and dealt with in the same manner as money standing to a dilapidation account. If the building cannot be reinstated for the amount for which it was insured, the diocesan surveyor is to certify the additional sum required for the purpose, with the same liberty to the incumbent or sequestrator to object and the same final order of the bishop as in the case of a report as to dilapidations. The prescribed sum is to be paid to Queen Anne's

Bounty, if the benefice is not sequestrated, by the incumbent (with power to the bishop, in default of payment, to raise the amount by sequestration of the benefice), or, if the benefice is under sequestration, by the sequestrator, in the same way as dilapidation money is payable by the incumbent or the sequestrator, as the case may be; and the money so paid to Queen Anne's Bounty will be paid out on certificates of the surveyor during the progress of the works, as in the case of dilapidation repairs.[1]

15. The provisions of the Act do not apply to buildings let on lease where the lessee is liable to insure, rebuild, and repair; but the diocesan surveyor has power to inspect any such buildings.[2]

16. Although there is no positive rule of law on the subject, an incumbent should, as a matter of prudence, obtain a faculty, or at any rate the written consent of the bishop and patron, before making any substantial alteration in the parsonage house or other buildings of the benefice. If he fails to do so, he proceeds at the risk of himself and his estate; and if his action is afterwards challenged, it will lie upon him or his executors to prove that it was justifiable.[3] The precaution should never be omitted in the case of removing a building without erecting another in its place.

[1] (1871) 34 & 35 Vict. c. 43, ss. 54–57. [2] *Ib.* ss. 58, 59.
[3] Huntley *v.* Russell (1849) 13 Q. B. 572; 13 Jur. 837; 18 L. J. Q. B. 239.

With regard to any building belonging to or forming part of a parsonage house which appears to be unnecessary, the bishop, on the application of the incumbent, and with the written consent of the patron, is expressly empowered to authorise its removal; and any net proceeds of the removal will be applied to the improvement of the benefice in such manner as the bishop and patron may agree.[1] The foregoing remarks do not apply to structures such as movable sheds or garden frames, which are not regarded in law as affixed to the soil and therefore hereditaments like the land on which they stand, nor to fancy structures with which the succeeding incumbents ought not to be burdened.[2]

17. Upon the vacation of a benefice, the incumbent or his estate ceases to be entitled to the income and house of residence of the benefice. But on the death of a married incumbent who was at the time occupying the house of residence, his widow has a right to remain in occupation for two months after his death;[3] and in every case, until the question of dilapidations is settled, the late incumbent or his executors or administrators may, at reasonable hours, with a surveyor, enter upon the premises of the vacated

[1] (1871) 34 & 35 Vict. c. 43, s. 71.
[2] Huntley *v.* Russell, *ubi sup.*; Martin *v.* Roe (1857) 7 E. & B. 237; 3 Jur. N. S. 465; 26 L. J. Q. B. 129.
[3] (1838) 1 & 2 Vict. c. 106, s. 36.

benefice.[1] If the vacancy occurs otherwise than by resignation, the late incumbent or his executors or administrators have a right to emblements, that is to say, to reap and enjoy any crops which he sowed before the vacancy occurred but which have not ripened until afterwards.[2] Where, however, the glebe land is not cultivated by the incumbent himself, but is let to tenants, the current rents are in all cases apportionable between the late incumbent, or his estate, and the new incumbent, up to and from the date of the occurrence of the vacancy; and the same rule applies to tithe rentcharge and to any other income from endowments.[3] Subject to these rights and to provision being made out of the revenue of the benefice for the service of the cure during the vacancy,[4] the new incumbent, on his admission, becomes entitled to the temporalities of the benefice as from the date when the vacancy took place.

18. Under the Tithe Act, 1836,[5] and various amending Acts, a tithe commutation rentcharge has now been substituted for all the ancient tithes, except tithes of fish or of fishing, personal tithes (other than the tithes of mills), mineral

[1] (1871) 34 & 35 Vict. c. 43, s. 29.

[2] (1536) 28 Hen. 8, c. 11, s. 4; Bulwer *v.* Bulwer (1819) 2 B. & Ald. 470.

[3] (1738) 11 Geo. 2, c. 19, s. 15; (1834) 4 & 5 Will. 4, c. 22; (1836) 6 & 7 Will. 4, c. 71, s. 86; (1870) 33 & 34 Vict. c. 35.

[4] See ch. iii. § 2 (*a*) above.

[5] 6 & 7 Will. 4, c. 71.

tithes, payments instead of tithes within the City of London, permanent rentcharges or other payments in lieu of tithes calculated on the rent or value of houses or lands in a city or town under a custom or private Act, and tithes commuted or extinguished under a previous Act. And any of the excepted tithes and payments, as well as Easter offerings, mortuaries, and surplice fees, could be brought within the operation of the Acts by special provisions inserted in the parochial agreements framed under the Acts and approved by the Tithe Commissioners.[1] Where the rectory is impropriate and there is a vicarage, the tithe commutation rentcharge payable to the rector has been assessed in lieu of the rectorial or great tithes, namely, those on corn, hay and wood, and the rentcharge payable to the vicar has been assessed in lieu of the vicarial or small tithes, those on fruits, herbs, live stock, poultry, milk, cheese, and eggs. Under the earlier Acts an extraordinary tithe rentcharge was leviable on lands for the time being cultivated as hop gardens, orchards, fruit plantations, and market gardens; but this special rentcharge has since been abolished, the lands which had been in practice liable to it having been made liable to a fixed additional rentcharge instead.[2] The ordinary

[1] 6 & 7 Will. 4, c. 71, s. 90. The Statutory powers of the Tithe Commissioners are now vested in the Board of Agriculture.

[2] (1839) 2 & 3 Vict. c. 62, s. 28; (1860) 23 & 24 Vict. c. 93, ss. 42, 43; (1886) 49 & 50 Vict. c. 54; (1897) 60 & 61 Vict. c. 23.

tithe rentcharge varies with the average prices of wheat, barley, and oats during the preceding seven years. It was originally assessed on the footing that £33, 6s. 8d. would buy 94·96 bushels of wheat, or 168·42 bushels of barley, or 242·42 bushels of oats; so that £100 of rentcharge was equivalent to those amounts of the three grains. The actual amount of £100 nominal rentcharge in any year is accordingly the sum which would buy those amounts of the three grains at the septennial average prices published in the *London Gazette* at the beginning of the year.[1]

19. Tithe commutation rentcharge is payable half-yearly by the owner of the land on which it is assessed. If it is in arrear for more than three months, it may be recovered on application to the county court, (*a*) if the owner is in occupation of the land, by distress, or, if there is no sufficient distress, by proceedings to obtain possession of the land under section 82 of the Tithe Act, 1836, and (*b*) in other cases, by the appointment of a receiver of the rents and profits of the land.[2] Special facilities are given for the recovery of tithe rentcharge payable in respect of land in the hands of a railway company which is in arrear for twenty-one days or upwards, by distress upon the goods of the company on any part of its line.[3]

[1] (1882) 45 & 46 Vict. c. 37 (Corn Returns).
[2] (1891) 54 & 55 Vict. c. 8.
[3] (1844) 7 & 8 Vict. c. 85, s. 22.

20. The dues payable to the clergy are of two kinds: (i.) ordinary dues and offerings, and (ii.) dues or fees payable for special services or special concessions. Both kinds vary considerably by law or custom in different places, and, as regards the former, an Act of 1548 provides that all persons who by the laws or customs of the realm ought so to do, shall yearly pay their offerings to the parson or vicar of the parish in which they dwell at the accustomed four offering days, or in default thereof at the next following Easter. Generally speaking, Easter offerings are the only offerings of this description which are still payable.[1] They are enjoined by the rubric at the end of the Communion Office and are due of right, and are recoverable under the Small Tithes Recovery Act, 1696,[2] before two justices, subject to an appeal to quarter sessions. Their legal amount, in the absence of custom to the contrary, is twopence per head, or, in London, fourpence per house.[3] But these sums were fixed when the value of money and the wealth of the country were very different from what they are at present; and it is reasonable that voluntary Easter offerings

[1] 2 & 3 Edw. 6, c. 13, s. 10 (see (1887) 50 & 51 Vict. c. 59, sch.). The four offering days are Christmas, Easter, Whitsuntide, and the feast of the dedication of the parish church; Gibs. Cod. 705.

[2] 7 & 8 Will. 3, c. 6.

[3] Wats. ch. lii. p. 585; Carthew *v.* Edwards (1749) Ambl. 71; (1866) L. R. 1 Q. B. 632; Phill. Eccl. Law, Pt. v. ch. iv. § 2, pp. 1242–1245.

should now be made on quite another scale. The vicar of a new ecclesiastical parish has the same right to Easter offerings as the incumbent of the ancient parish out of which it was carved.[1]

21. Mortuaries or offerings at the time of a person's death are due in certain places by custom, and, where so due, are recoverable in the ecclesiastical courts. But by an Act of 1529, they were limited to 10s. as the maximum and to small amounts where the deceased died worth less than £40 in movable goods, none being payable if the deceased was not a householder and worth at least ten marks in movable goods, and a penalty was attached to demanding an illegal amount.[2]

22. Dues or fees payable for special services or concessions have already been mentioned in connection with churchings, marriages and burials, including in the last mentioned category those payable for the funeral itself, for the grave, and for any tombstone or monument to be erected upon it.[3]

23. In some cases the incumbent's stipend depends wholly or in part upon pew rents. They can only legally be taken where authorised by a special or general Act of Parliament. In some churches they have been sanctioned by a special Act, which prescribes their application, and the proportion (if any) which shall go towards the

[1] (1843) 6 & 7 Vict. c. 37, s. 15.

[2] (1285) 13 Edw. 1, st. *Circumspecte agatis ;* (1529) 21 Hen. 8, c. 6 ; Wats. ch. liii. pp. 595–598 ; Phill. Eccl. Law, Pt. iii. ch. x. § 5, pp. 685–9.

[3] See above, ch. v. § 10 ; ch. vi. § 15 ; ch. vii. §§ 5, 6, 8, 9.

incumbent's stipend. They are also sanctioned in certain cases by the Church Building Acts and New Parishes Acts. Where pew rents are fixed under these Acts, the incumbent is entitled to such portion of them as may be settled in the manner therein prescribed;[1] and he can recover that portion from the churchwardens by an action at law.[2] An incumbent, who has a vote for a parliamentary borough as a resident therein, and who receives for his own use part of the pew rents of the church, which is also situate in the borough, but which is his freehold, has a parliamentary vote for the county as a freeholder, since he does not occupy the church within the meaning of 2 & 3 Will. 4, c. 45, s. 24.[3]

24. The incumbents of certain ancient benefices above the yearly value of £50 are liable to the payment to Queen Anne's Bounty of first fruits in the first year of their incumbency and tenths in succeeding years. The first fruits are the amount of one year's value of the benefice as recorded in the *valor beneficiorum* or King's Books compiled in the sixteenth century, and the tenths are one-tenth of the same amount. They were originally

[1] Sm. Churchw. 67–71; (1818) 58 Geo. 3, c. 45, ss. 62–66, 73–79; (1819) 59 Geo. 3, c. 134, ss. 6, 26, 27, 30–33; (1822) 3 Geo. 4, c. 72, ss. 23–25; (1824) 5 Geo. 4, c. 103, ss. 10, 11, 18; (1831) 1 & 2 Will. 4, c. 38, ss. 4, 5, 22; (1845) 8 & 9 Vict. c. 70, s. 11; (1838) 1 & 2 Vict. c. 107, s. 18; (1856) 19 & 20 Vict. c. 104, ss. 6–8; (1884) 47 & 48 Vict. c. 65, s. 4.

[2] Lloyd *v.* Burrup (1868) L. R. 4 Ex. 63.

[3] Wolfe *v.* Clerk of Surrey County Council; Reeve *v.* The Same (1904) 1 K. B. 439.

paid to the Pope, and were annexed by Henry VIII. to the Crown, until Queen Anne bestowed them on the Bounty which bears her name, to form a fund for the augmentation of poor livings. Where they are payable, first fruits are due three months after admission to the benefice, and tenths annually at Christmas. An incumbent is only chargeable with the whole of the first fruits if he remains incumbent at the end of two years from the occurrence of the vacancy which he was appointed to fill. He is liable to none, or to one-fourth, one-half or three-fourths, if he dies or is removed within the first, second, third, or fourth half-year after that event.[1] Two Acts passed in 1706 and 1707[2] discharged from the payment of first fruits and tenths all benefices which at the time were under the annual value of £50, except that those of which the tenths had been previously granted away by the Crown to other parties were still to continue liable to tenths only. Other exemptions have been granted in favour of particular benefices at different times; and in 1837, out of 10,498 benefices with and without cure of souls, only 4898 remained liable to tenths, 4500 of that number being also liable to first fruits.[3]

[1] (1559) 1 Eliz. c. 4, s. 6; Wats. ch. xv. pp. 174–9; Phill. Eccl. Law, pt. v. ch. viii. pp. 1355–64.

[2] 6 Ann. cc. 24, 54.

[3] Report of Select Committee on First Fruits and Tenths and Administration of Queen Anne's Bounty (presented to the House of Commons and ordered to be printed 7th June 1837), p. iv.

25. Income or property tax is payable by an incumbent under schedule (A) in respect of his house of residence, glebe lands, and tithe rentcharge.[1] In respect of any landed property (other than a house of residence) actually occupied by him, income tax is also payable on one-third of its annual value, except that if he occupies it for the sole purpose of husbandry and can show that his profits fell short of that one-third, the tax is payable on the actual amount of the profits.[2] The tax is also payable by him in respect of all other stipend, fees, perquisites and profits accruing to him by reason of his incumbency. But in estimating these a clergyman or other minister of religion may deduct money paid and expenses incurred wholly, exclusively, and necessarily in the performance of his ministerial duties. In two Scotch cases these deductions were held to include the expense of visiting members of his congregation, attending church meetings enjoined on him as part of his duty, outlay on stationery, and communion expenses; but no deduction was allowed in respect of part of the manse used as an office for his clerical business, or for the cost of books or for a voluntary contribution made by him towards

[1] In estimating the value of tithe rentcharge, the necessary cost of collection may be deducted, Stevens *v.* Bishop (1887) 19 Q. B. D. 442; aff. (1888) 20 Q. B. D. 442.

[2] 59 & 60 Vict. c. 28 (Finance Act, 1896) ss. 26, 27.

the stipend of an assistant minister.[1] There is sometimes a difficulty in determining whether sums of money which are granted or given to a clergyman, but are not part of his legal or recognised stipend, are taxable perquisites or profits accruing to him by reason of his office or not. The true test, namely, whether the gift is made to him in respect of his office or is personal to himself, is not easy to apply in particular instances. In another Scotch case it was held that a voluntary contribution made by parishioners to their minister, and received by him in respect of the discharge of the duties of his office, was taxable.[2] A grant to a curate by the Curates' Augmentation Fund in recognition of upwards of fifteen years' faithful service is not taxable, not being made in respect of performing present duties. But a grant to an incumbent from the Queen Victoria Clergy Fund, being made in respect of the poverty of his benefice, was decided by the Court of Appeal to be taxable, although the Divisional Court below had held the contrary.[3]

[1] 16 & 17 Vict. c. 34 (Income Tax Act, 1853) s. 52; Charlton *v.* Inland Revenue Commissioners (1890) 27 Sc. L. R. 647; Lothian *v.* Macrae (1883) 22 Sc. L. R. 219.

[2] Inland Revenue *v.* Strang (1878) 15 Sc. L. R. 704.

[3] Turner *v.* Cuxon (1888) 22 Q. B. D. 150; Herbert *v.* M'Quade (1901) 2 K. B. 761; rev. on app. (1902) 2 K. B. 631.

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